TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 395.

J. MARKHAM MARSHALL, WALTER T. ROSEN, AND RUDOLPH METZ, AS TRUSTEES, &c., PLAINTIFFS IN ERROR,

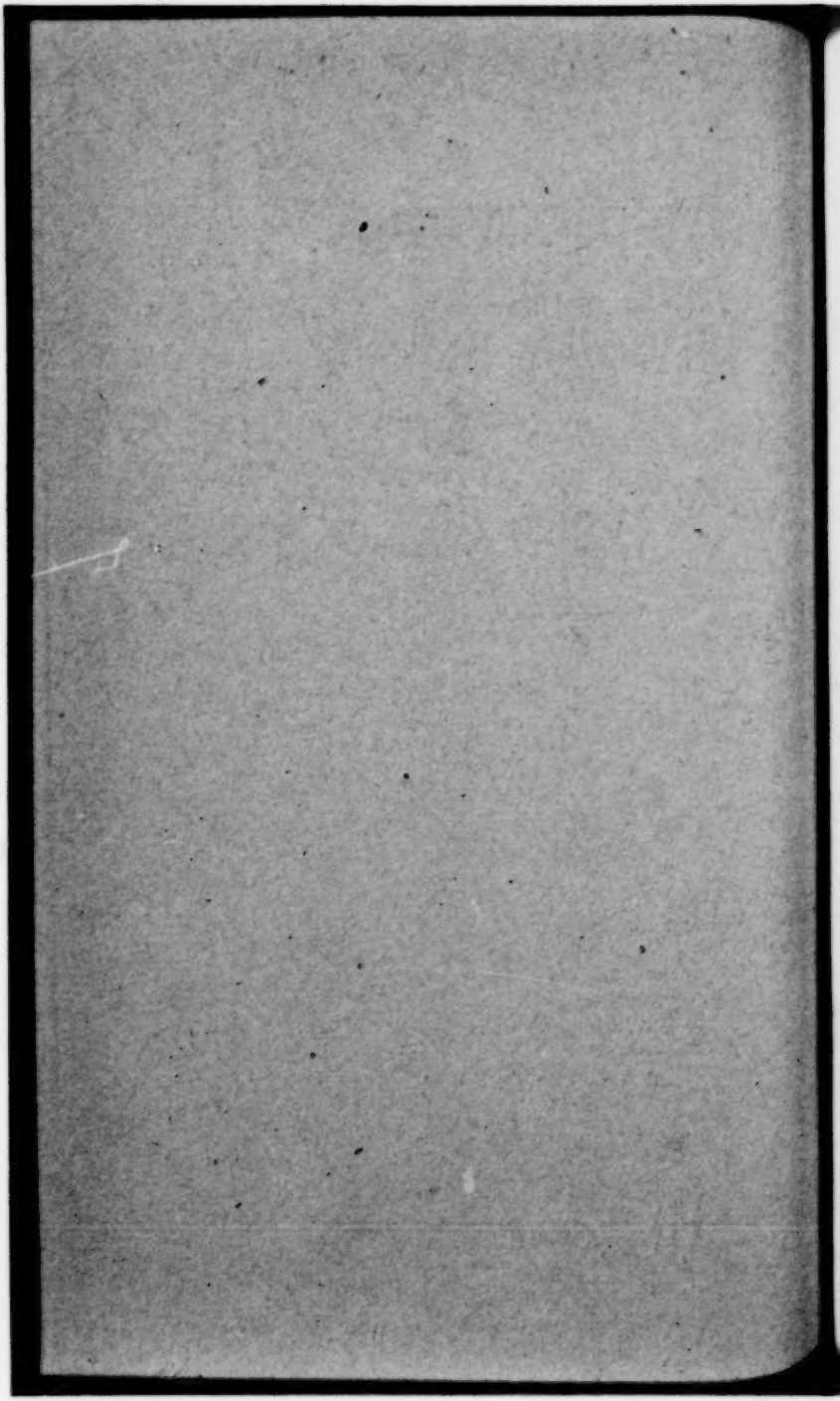
vs.

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 14, 1920.

(27,752)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 19, 1920.

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a United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant, Appellee,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

Transcript of Record.

Root, Clark, Buckner & Howland, Proctors for Claimants-Appellants, Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

1 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

Statement Under Rule IV, Section 1, Subdivision 1.

This proceeding was commenced on the 8th day of March, 1919, by Francis P. Garvan, as Alien Property Custodian, to secure possession of certain bonds and stocks which he claims as the property of the Munich Re-Insurance Company "an enemy not holding a license granted by the President" by filing a libel of information praying the Court to enter an order directing the Marshal to seize the securities. An order was accordingly entered on the 8th day of March, 1919, directing such seizure and the securities were seized by
2 the Marshal and are now in his possession. The order required all persons having any claim to the property to show cause why the property libelled should not be ordered by the Court, delivered by the Marshal to the Petitioner, as Alien Property Custodian, to be by him held, administered and accounted for as provided by law. Monition was duly published and the Marshal's return filed. J. Markham Marshall, Walter T. Rosen and Rudolph Metz, as joint trustees for the protection of the policy holders of the Munich Re-insurance Company filed a claim to the securities on the 22nd day of March, 1919, and an answer to the libel on the 10th day of April 1919. No other claim was filed. The Alien Property Custodian thereupon, on the 19th day of April, 1919, orally moved before Hon. A. N. Hand, District Judge, for judg-

ment on the pleadings. The final decree granting the motion of libellant for judgment on the pleadings was filed on the 6th day of October, 1919. The notice of appeal was filed on the 16th day of October, 1919. There has been no change of parties since the proceeding was commenced.

3 *Petition for Appeal.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The claimants feeling themselves aggrieved by the decree made and entered in the above entitled cause on the 6th day of October, 1919, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and supersedeas granted and that citation be issued as provided by law directed to the above named libellant, commanding him to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, October 16, 1916.

ROOT, CLARK, BUCKNER & HOWLAND,
Proctors for Claimants, J. Markham Marshall, Walter T. Rosen and Rudolf Metz, Trustees.

4 *Order Allowing Appeal.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

The claimants having filed a petition for appeal from the decree made and entered herein on the 6th day of October, 1919, it is

Ordered that the said appeal of the said claimants from said decree to the United States Circuit Court of Appeals for the Second Circuit, be and the same hereby is allowed; and it is

Further ordered that the claimants file a bond in the sum of Five Hundred ($500) Dollars on or before the 16th day of October, 1919, the same to act as a supersedeas bond and also as a bond for costs on appeal; and it is

Further ordered that all proceedings herein be stayed saving those connected with the appeal herein, pending the final determination of said appeal or the further order of this Court.

Dated October 16, 1919.

JNO. KNOX,
United States Judge.

5 *Notice of Appeal.*

United States District Court, Southern District of New York

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

TWENTY-FIVE THOUSAND DOLLARS PAR VALUE CHESAPEAKE & OHIO RAILWAY Four and One-half Per Cent Convertible Bonds, and Other Bonds, Stocks and Other Securities.

SIRS:

Please take notice that the claimants herein hereby appeal to the United States Circuit Court of Appeals for the Second District from the final decree entered herein October 6th, 1919.

Dated, October 16, 1919.

ROOT, CLARK, BUCKNER & HOWLAND,
Proctors for Claimant and Appellant.

Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, New York, N. Y.

6 To

Francis G. Caffey, Esq., United States Attorney, proctor for Libellant and Appellee, U. S. Post Office Building, Borough of Manhattan, New York, N. Y.

Alex. J. Gilchrist, Esq., Clerk, U. S. District Court, Southern District of New York, U. S. Post Office Building, Borough of Manhattan, New York, N. Y.

Citation.

By the Honorable John Knox, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Francis P. Garvan, Alien Property Custodian, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 15th day of November, 1919, pursuant to an order filed in the Clerk's office of the District Court of the United States for the Southern District
7 of New York, wherein J. Markham Marshall, Walter T. Rosen and Rudolf Metz, Trustees, are claimants of $25,000 par value Chesapeake and Ohio Railway 4½% Convertible Bonds and other bonds, stocks and other securities, and you are libellant to show cause, if any there be, why the decree in said order mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 10th day of October, in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States the One Hundred and Forty-fourth.

JNO. KNOX,
Judge of the District Court of the United States for the Southern District of New York in the Second Circuit.

8 *Libel of Information.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

vs.

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Francis P. Garvan, as Alien Property Custodian, brings this proceeding, being in the nature of a libel of information against $25,000 par value of Chesapeake & Ohio Railway 4½% Convertible Bonds and other bonds, stocks and other securities, a list of which is annexed hereto in Exhibit A, and says:

1. That your petitioner is the Alien Property Custodian of the United States duly appointed and qualified as such and is now and

at all times hereinafter mentioned has been acting as such pursuant to the provisions of the Trading with the Enemy Act approved October 6, 1917, and the amendments thereto, and the Executive orders and proclamations issued thereunder.

2. That your petitioner, acting as the Alien Property Custodian pursuant to the authority vested in him as aforesaid, did, on the 7th day of March, 1919, after investigation, determine that the Munich Re-Insurance Company was an enemy not holding a license granted by the President, and that certain property against which this proceeding is brought, set forth in Exhibit A to this libel of information, belonged to and was owned by the said Munich Reinsurance Company, and was held for, by, on account of, or for the benefit of, the said Munich Reinsurance Company by the National Park Bank, a corporation organized and existing under the laws of the United States, having its principal office at 214 Broadway, in the Southern District of New York, in the Borough of Manhattan and the City and State of New York.

3. That on the said 7th day of March, 1919, and subsequent to such investigation and determination as aforesaid, the libellant, under the authority vested in him as aforesaid, did require from the National Park Bank that said securities set forth in Exhibit A be transferred, assigned and delivered over to him as such Alien Property Custodian, to be by him held, accounted for and administered according to law.

4. That on the said 7th day of March, 1919, and again on the 8th day of March, 1919, your libellant, under the authority vested in him as aforesaid, did attempt to make a seizure of said securities, but that the said National Park Bank, which now is and at all times mentioned herein has been in physical possession of said securities, did and does now wrongfully and contrary to law withhold from libellant said securities.

5. That said securities are now and at all the times hereinbefore mentioned were upon the premises aforesaid of the National Park Bank at its principal office, said place being within the Southern District of New York and within the jurisdiction of this Court.

6. That for the statement of the grounds upon which this Court's jurisdiction depends, libellant says that this is a proceeding in the nature of a libel of information arising under Section 17 of the Trading with the Enemy Act approved October 6, 1917, by virtue of which this court has jurisdiction to make such orders and decrees as may be necessary to enforce the provisions of that Act.

7. That the provision of the Trading with the Enemy Act which this Court is asking to enforce is Section 7 (*c*) of the Trading with the Enemy Act, as amended November 4, 1918.

8. That all and singular the premises are true and within the jurisdiction of this Court.

Wherefore, libellant prays that this Court make and enter an order directing the Marshal of the Southern District of New York forthwith to seize and take possession of said securities mentioned in Exhibit A hereto and hold the same until further order of this Court and that this Court make and enter an order requiring and citing all persons having or pretending to have any claim to the possession of said securities to appear at the time and place
11 to be fixed in said order to show cause why the possession of said securities should not be delivered by the Marshal to the libellant to be by the libellant held, administered and accounted for as Alien Property Custodian according to the law and for such other order or relief in the premises as to the Court shall seem just.

FRANCIS P. GARVAN,
As Alien Property Custodian, Libellant.

FRANCIS G. CAFFEY,
United States Attorney,
Proctor for Libellant.

12 EXHIBIT A.

Bond.	Interest.	Date.	Maturity.	Amount
Atlanta & Charlotte Air Line, First Mortgage	4½	Jan.-Jul.	1944	$[illegible]
Atlantic Coast Line R. R. Louisville & Nashville Coll.	4	May-Nov.	1952	25,000
Atlantic & Danville R. R. First Mortgage	4	Jan.-Jul.	1948	30,000
Baltimore & Ohio R. R., Equipment Series "H"	4½	Apr.-Oct.	1921	10,000
Baltimore & Ohio R. R., Equipment Series "I"	4½	Apr.-Oct.	1922	10,000
Baltimore & Ohio R. R., Equipment Series "J"	4½	Apr.-Oct.	1923	10,000
Baltimore & Ohio R. R., Equipment Refunding Mortgage	5	June-Dec.	1995	25,000
Birmingham Railway, Light & Power Co., General refunding	4½	Apr.-Oct.	1954	11,000
Broadway & 7th Avenue R. R., First Mortgage	5	June-Dec.	1943	5,000
Brooklyn Union Elevated R. R. 4½% First Mortgage	5	Feb.-Aug.	1950	20,000
Central Railroad of N. J. General Mortgage	5	Jan.-Jul.	1987	5,000
Central Pacific Railway, First Refunding Mortgage	4	Feb.-Aug.	1949	125,000
Chesapeake & Ohio Railway R. & A. Div. 1 Cons. Mtge.	4	Jan.-Jul.	1989	5,000
Chesapeake & Ohio Railway, General Mortgage	4½	Mar.-Sept.	1992	25,000
Chesapeake & Ohio Railway Convertible	4½	Feb.-Aug.	1930	25,000
Chicago & Alton R. R. Refunding Mortgage	3	Apr.-Oct.	1949	50,000
Chicago & Northwestern Railway, General Mortgage	5	May-Nov.	1987	8,000
Chicago & Western Indiana R. R. Cons. Mortgage	4	Jan.-Jul.	1952	50,000
Chicago, Lake Shore & Eastern Railway First Mtge.	4½	Jun-Dec.	1969	25,000

EXHIBIT A—Continued.

Bond.	Interest.	Date.	Maturity.	Amount.
Chicago, Milwaukee & Puget Sound Railway, First Mtge.	4	Jan.-Jul.	1949	[illegible]
Chicago, Milwaukee & St. Paul Railway, General Mtge.	4½	Jan.-Jul.	1989	[illegible]
Chicago, Rock Island & Pacific Railway, Refunding	4	Apr.-Oct.	1934	[illegible]
Chicago Union Station Company, First Mortgage	4½	Jan.-Jul.	1963	[illegible]
Cincinnati, Indianapolis, St. Louis, Chicago R. R.	4	F-M-A-N.	1936	[illegible]
Cleveland, Cincinnati, Chicago & St. Louis R. R. Gen. Mtge.	4	Jun-Dec.	1993	[illegible]
Georgia & Southern Railway, Refunding & ext.	4½	May-Nov.	1955	[illegible]
Consolidated Gas Company of New York, Convertible	6	F-M-A-N.	1920	[illegible]
Delaware & Hudson Co., First Mortgage & Refunding Mtge.	4	May-Nov.	1934	[illegible]
Detroit & Mackinac R. R. First Lien.	4	Jun-Dec.	1995	[illegible]
Detroit Terminal & Tunnel First Mortgage	4½	May-Nov.	1961	[illegible]
Erie Railroad Co. General Lien	4	Jan.-Jul.	1996	[illegible]
Erie Railroad Co. Prior Lien	4	Jan.-Jul.	1996	[illegible]
Erie Railroad Co. Pennsylvania Collateral Trust	4	Feb.-Aug.	1951	[illegible]
Florida, West Shore Railway First Mortgage	5	Jan.-Jul.	1934	[illegible]
German Imperial Government Treasury Bonds	5	Mar.-Sept.	1918	[illegible]
Hocking Valley Railway, First, Conv. Mtge.	4½	Jan.-Jul.	1999	[illegible]
Illinois Central R. R. St. Louis Div.	3½	Jan.-Jul.	1951	[illegible]
Interborough Rapid Transit Co. First & Refunding Mtge.	5	Jan.-Jul.	1966	[illegible]
Lake Shore & Michigan Railway First Mortgage	4	Apr.-Oct.	1998	[illegible]
Kansas City, First Scott & Memphis Railway Refunding	4	Apr.-Oct.	1936	[illegible]
Kansas City, Southern Railway, First Mortgage	3	Apr.-Oct.	1950	[illegible]
Kansas City, Southern Railway Refunding & Impt.	5	Jan.-Jul.	1950	[illegible]
Lake Erie & Western R. R. First Mortgage	5	Jan.-Jul.	1937	[illegible]
Louisville & Nashville R. R. St. Louis Div. Sec. Mtge.	3	Mar.-Sept.	1980	[illegible]
Macon, Dublin & Savannah R. R. First Mortgage	5	Jan.-Jul.	[illegible]	[illegible]
Manhattan Railway Consolidated Mortgage	4	Apr.-Oct.	1990	[illegible]
Minneapolis, St. Paul, Sault Ste. Marie Railway	4	Jan.-Jul.	1938	[illegible]
New York, Chicago & St. Louis R. R. Debentures	4	May-Nov.	1931	[illegible]
New York, New Haven & Hartford R. R. Conv. Debentures	6	Jan.-Jul.	1948	[illegible]

*$100 in Coupons not cashed.
$10,000 in Coupons not cashed—deposited with Ladenburg Thalmann Co.

EXHIBIT A—Continued.

Bond.	Interest.	Date.	Maturity.	Amount.
New York, New Haven & Hartford R. R. Conv. Debentures				
New York, Ontario & Western Railway, General Mtg.	3½	Jan.-Jul-	1956	90,000
Northern Pacific R. R. Prior Lien	4	Jun-Dec.	1955	100,000
Northern Pacific R. R. St. Paul, Duluth Division	4	J-A-J-O.	1997	25,000
Oregon, Washington R. R. & Nav. Co. I. & Refunding Mtge.	4	June-Dec.	1996	50,000
14	4	Jan.-Jul-	1961	100,000
Philadelphia Company Convertible Debentures	5	May-Nov.	1922	50,000
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Cons. Mortgage	4½	Feb.-Aug.	1963	50,000
Reading Company, General Mortgage	4	Jan.-Jul-	1997	50,000
Rio Grande Western R. R. First Mortgage	4	Jan.-Jul-	1939	20,000
San Antonio & Aransas Pass. First Mortgage	4	Jan.-Jul-	1943	50,000
Seaboard Air Line Railway, Atlanta, Birmingham Div.	4	Mar.-Sept.	1933	50,000
Seaboard Air Line Railway, Refunding Mortgage	4	Apr.-Oct.	1959	100,000
Seaboard Air Line Railway, First Consolidated Mtge.	6	Mar.-Sept.	1945	50,000
Southern Pacific R. R. Central Pacific Collateral	4	Jun-Dec.	1949	25,000
Southern Railway, St. Louis Division, First Mtge.	4	Jan.-Jul-	1951	25,000
St. Louis & San Francisco Railway, Prior Lien Mtge.	4	Jan.-Jul-	1950	112,500
St. Louis & San Francisco Railway, Adjustment Mtge.	6	Apr.-Oct.	1955	37,500
St. Louis Southwestern R. R. First Mtge.	4	May-Nov.	1989	50,000
Toledo & Ohio Central Railway, First Mtge.	5	Jan.-Jul-	1935	12,000
Toledo & Ohio Central Railway, First Mtge. Western Div.	5	Apr.-Oct.	1935	15,000
Union Pacific R. R. First Lien and Refunding	4	Mar.-Sept.	2008	50,000
Wabash Railroad, Omaha Div. First Mortgage	3½	Apr.-Oct.	1941	50,000
Western Maryland R. R. First Mtge.	4	Apr.-Oct.	1952	75,000
Western N. Y. & Pennsylvania R. R. General 3-4%	4	Apr.-Oct.	1943	20,000
Wheeling & Lake Erie R. R. First Consolidated	4	Mar.-Sept.	1949	25,000
Wisconsin Central Railway, First General Mtge.	4	Jan.-Jul-	1949	74,000
Stocks.				
Atchinson, Topeka & Santa Fe R. R. Preferred	5	Feb.-Aug.	....	25,000
Consolidated Gas Company of New York	7	M-J-S-D.	....	25,000
Norfolk & Western Railroad Preferred	4	F-M-A-N.	....	20,000
Pennsylvania Railroad	6	J-A-J-O.	....	75,000

‡$1,575 in Coupons not cashed.

15 STATE OF NEW YORK
County and Southern District of New York, ss:

Francis P. Garvan, being duly sworn, says on oath that he is the Alien Property Custodian of the United States and the libellant in the above entitled proceeding; that he has read the foregoing libel and knows the contents thereof and that the same are true except as to such portions as are alleged on information and belief and as to these, is informed and believes the same to be true.

FRANCIS P. GARVAN.

Subscribed and sworn to before me this 8th day of March, 1919.

E. H. McCOLLOCK,
Notary Public No. 92.

N. Y. County Register's No. 10055.

Commission expires March 30, 1920.

16 *Order Directing Seizure of Securities.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held in the U. S. Court House and Post Office Building, Borough of Manhattan, City of New York, on the 8th Day of March, 1919.

Present: Hon. John C. Knox, United States District Judge.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

vs.

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

Upon the libel in the above entitled proceeding verified March 8, 1919, after hearing Francis G. Caffey, United States Attorney for the Libellant and Louis F. Doyle, attorney for the National Park Bank, appearing and submitting its rights to the Court) and Silas W. Howland and Emory R. Buckner of Root, Clark, Buckner & Howland, attorneys for J. Markham Marshall, Walter T. Rosen and Rudolph Metz, Trustees for the Munich Reinsurance Company of Munich (appearing stating the claims
17 of said Trustees to the securities mentioned in the libel and opposing the making of this order), and upon motion of Francis G. Caffey, United States Attorney, it is

Ordered that the Marshal of the Southern District of New York forthwith seize and take into possession all the securities mentioned in Exhibit A attached to the libel and hold the same until a further order of this Court.

Further ordered that all persons having or pretending to have any claim to the possession of said securities or any of them appear at a

term of this Court to be held at the United States Courts and Post Office Building, Borough of Manhattan, New York City, on the 24th day of March, 1919, at 10.00 o'clock in the forenoon thereof or as soon thereafter as counsel can be heard and then and there show cause, if any, why the possession of said securities should not be delivered by the Marshal to the libellant to be by the libellant as Alien Property Custodian held, administered and accounted for according to law and that the Clerk of this Court issue process accordingly.

JNO. C. KNOX,
U. S. D. J.

18 *Monition.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States to the Marshal of the Southern District of New York, Greetings:

Whereas, a libel of information has been filed in the District Court of the United States for the Southern District of New York on the 10th day of March in the year of our Lord one thousand nine hundred and nineteen, by Francis G. Caffey, Esq., United States District Attorney, on behalf of the Alien Property Custodian against

(Here follows list of stocks, etc., marked pages 19-20.)

A) NATIONAL PARK BANK, NEW YORK

Bonds	Interest	Date	Maturity	Amount	
Atlanta & Charlotte Air Line Ry. First Mortgage	4½%	Jan.-July	1944	$50,000.	
Atlantic Coast Line R. R. Louisville & Nashville Coll.	4 %	May-Nov.	1952	$25,000.	
Atlantic & Danville R. R. First Mortgage	4 %	Jan.-July	1948	$30,000.	
Baltimore & Ohio R. R. Equipment Series "H"	4½%	Apr.-Oct.	1921	$10,000.	
Baltimore & Ohio R. R. Equipment Series "I"	4½%	Apr.-Oct.	1922	$10,000.	
Baltimore & Ohio R. R. Equipment Series "J"	4½%	Apr.-Oct.	1923	$10,000.	
Baltimore & Ohio R. R. Refunding Mortgage	5 %	June-Dec.	1995	$25,000.	
Birmingham Ry. Light & Power Co. General Refunding	4½%	Apr.-Oct.	1954	$11,000.	
Broadway & Seventh Ave. R. R. First Mortgage	5 %	June-Dec.	1943	$5,000.	
Brooklyn Union Elevated R. R. 4½% First Mortgage	5 %	Feb.-Aug.	1950	$50,000.	
Central Railroad of New Jersey, General Mortgage	5 %	Jan.-July	1987	$5,000.	
Central Pacific Ry. First Refunding Mortgage	4 %	Feb.-Aug.	1949	$125,000.	
Chesapeake & Ohio Ry. & A. Division I. Cons. Mtge	4 %	Jan.-July	1989	$5,000.	$100 in coupons not cashed
Chesapeake & Ohio Ry. General Mortgage	4½%	Mar.-Sept.	1992	$75,000.	
Chesapeake & Ohio Ry. Convertible	4½%	Feb.-Aug.	1930	$25,000.	
Chicago & Alton R. R. Refunding Mortgage	3 %	Apr.-Oct.	1949	$50,000.	
Chicago & Northwestern Ry. General Mortgage	5 %	May-Nov.	1987	$8,000.	
Chicago & Western Indiana R. R. Cons. Mortgage	4 %	Jan.-July	1952	$50,000.	
Chicago, Lake Shore & Eastern Ry. First Mortgage	4½%	June-Dec.	1969	$25,000.	
Chicago, Milwaukee & Puget Sound Ry. First Mortgage	4 %	Jan.-July	1949	$100,000.	
Chicago, Milwaukee & St. Paul Ry. General Mortgage	4½%	Jan.-July	1989	$100,000.	
Chicago, Rock Island & Pacific Ry. Refunding	4 %	Apr.-Oct.	1934	$50,000.	
Chicago Union Station Company First Mortgage	4½%	Jan.-July	1963	$50,000.	
Cincinnati, Indianapolis, St. Louis & Chicago R. R.	4 %	F.M.A.N.	1936	$10,000.	
Cleveland, Cincinnati, Chicago & St. Louis R. R. Genl. Mtge	4 %	June-Dec.	1993	$39,000.	
Colorado & Southern Ry. Refunding & Ext.	4½%	May-Nov.	1935	$50,000.	
Consolidated Gas Co. of New York, Convertible	6 %	F.M.A.N.	1920	$100,000.	
Delaware & Hudson Co. First & Refunding Mortgage	4 %	May-Nov.	1943	$100,000.	
Detroit & Mackinac R. R. First Lien	4 %	June-Dec.	1995	$100,000.	
Detroit Terminal & Tunnel First Mortgage	4½%	May-Nov.	1961	$50,000.	
Erie Railroad Co. General Lien	4 %	Jan.-July	1996	$50,000.	
Erie Railroad Company Prior Lien	4 %	Jan.-July	1996	$25,000.	
Erie Railroad Pennsylvania Collateral Trust	4 %	Feb.-Aug.	1951	$50,000.	
Florida West Shore Ry. First Mortgage	5 %	Jan.-July	1934	$25,000.	
German Imperial Government Treasury Bonds	5 %	Mar.-Sept.	1918	$200,000.	$10,000 in coupons not —cashed. Deposited with Ladenburg Thalmann Co.
Hocking Valley Railway First Cons. Mortgage	4½%	Jan.-July	1999	$31,000.	
Illinois Central R. R. St. Louis Division	3½%	Jan.-July	1951	$25,000.	
Interborough Rapid Transit Co. First & Refdg. Mtge	5 %	Jan.-July	1966	$50,000.	
Kanawha & Michigan Ry. First Mortgage	4 %	Apr.-Oct.	1990	$10,000.	
Kansas City, Fort Scott & Memphis Ry. Refunding	4 %	Apr.-Oct.	1936	$78,000.	
Kansas City Southern Ry. First Mortgage	3 %	Apr.-Oct.	1950	$164,000.	
Kansas City Southern Ry. Refunding & Impt.	5 %	Jan.-July	1950	$100,000.	
Lake Erie & Western R. R. First Mortgage	5 %	Jan.-July	1937	$4,000.	
Louisville & Nashville R. R. St. Louis Div., Second Mtge	3 %	Mar.-Sept.	1980	$16,000.	
Macon, Dublin & Savannah R. R. First Mortgage	5 %	Jan.-July	1947	$20,000.	
Manhattan Ry. Consolidated Mortgage	4 %	Apr.-Oct.	1990	$25,000.	
Minneapolis, St. Paul, Sault Ste Marie Ry.	4 %	Jan.-July	1938	$55,000.	
New York, Chicago & St. Louis R. R. Debentures	4 %	May-Nov.	1931	$25,000.	
New York, New Haven & Hartford R. R. Conv. Debentures	6 %	Jan.-July	1948	$7,000.	
New York, New Haven & Hartford R. R. Conv. Debentures	3½%	Jan.-July	1956	$90,000.	—$1575 in coupons *not cashed.*
New York, Ontario & Western Ry. General Mortgage	4 %	June-Dec.	1955	$100,000.	
Northern Pacific R. R. Prior Lien	4 %	J.A.J.O.	1997	$25,000.	
Northern Pacific R. R. St. Paul, Duluth Division	4 %	June-Dec.	1996	$50,000.	
Oregon-Washington R. R. & Nav. Co. I. & Refdg. Mtge	4 %	Jan.-July	1961	$100,000.	
Philadelphia Company Convertible Debentures	5 %	May-Nov.	1922	$50,000.	
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Cons. Mtge	4½%	Feb.-Aug.	1963	$50,000.	
Reading Company General Mortgage	4 %	Jan.-July	1997	$50,000.	
Rio Grande Western R. R. First Mortgage	4 %	Jan.-July	1939	$20,000.	
San Antonio & Arkansas Pass First Mortgage	4 %	Jan.-July	1943	$50,000.	
Seaboard Air Line Ry. Atlanta Birmingham Division	4 %	Mar.-Sept.	1933	$50,000.	
Seaboard Air Line Ry. Refunding Mortgage	4 %	Apr.-Oct.	1959	$100,000.	
Seaboard Air Line Ry. 1st Consolidated Mortgage	6 %	Mar.-Sept.	1945	$50,000.	
Southern Pacific R. R. Central Pacific Collateral	4 %	June-Dec.	1949	$25,000.	
Southern Ry. St. Louis Division First Mortgage	4 %	Jan.-July	1951	$25,000.	
St. Louis & San Francisco Ry. Prior Lien Mortgage	4 %	Jan.-July	1950	$112,500.	
St. Louis & San Francisco Railway Adjustment Mortgage	6 %	Apr.-Oct.	1955	$37,500.	
St. Louis Southwestern R. R. First Mortgage	4 %	May-Nov.	1989	$50,000.	
Toledo & Ohio Central Ry. First Mortgage	5 %	Jan.-July	1935	$12,000.	
Toledo & Ohio Central Ry. First Mortgage Western Div.	5 %	Apr.-Oct.	1935	$15,000.	
Union Pacific R. R. First Lien & Refunding	4 %	Mar.-Sept.	2008	$50,000.	
Wabash Railroad Omaha Division First Mortgage	3½%	Apr.-Oct.	1941	$50,000.	
Western Maryland R. R. First Mortgage	4 %	Apr.-Oct.	1952	$75,000.	
Western New York & Pennsylvania R. R. General ¼%	4 %	Apr.-Oct.	1943	$20,000.	
Wheeling & Lake Erie R. R. First Consolidated	4 %	Mar.-Sept.	1949	$25,000.	
Wisconsin Central Ry. First General Mortgage	4 %	Jan.-July	1949	$74,000.	
Stocks					
Atchison, Topeka & Santa Fe R. R. Preferred	5 %	Feb.-Aug.		$25,000.	
Consolidated Gas Company of New York	7 %	M. J. S. D.		$25,000.	
Norfolk & Western Railroad Preferred	4 %	F. M. A. N.		$20,000.	
Pennsylvania Railroad	6 %	J. A. J. O.		$75,000.	

B) LADENBURG, THALMANN & CO., NEW YORK

Bonds					
Atlantic Coast Line R. R. I. Cons. Mtge	4 %	Mar.-Sept.	1952	$75,000.	
Baltimore & Ohio R. R. Convertible	4½%	Mar.-Sept.	1933	$14,000.	
Chicago, Burlington & Quincy R. R. General Mortgage	4 %	Mar.-Sept.	1958	$25,000.	
German Imperial Government Treasury Notes	5 %	Mar.-Sept.	1918	$125,000.	
United States Government Registered Gold	4 %	F. M. A. N.	1925	$50,000.	
				$4,093,000.	

Deposit account with Ladenburg, Thalmann & Co., New York, of $76,753.27 with all additions thereto and accrued interest at the rate of 3½%.

21 for the reasons and causes in the said libel mentioned and praying the usual process and Monition of the said Court in that behalf to be made, and that all persons interested in said property may be cited, in general and special, to answer the premises: and all proceedings being had, that the said property may for the causes in the said libel mentioned, be disposed of as prayed for in said libel.

You are therefore hereby commanded to attach the said property and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be disposed of as prayed for in the libel pursuant to the prayer of the said libel that they be and appear before said court to be held in and for the Southern District of New York on the 24th day of March, 1919, at 10:30 o'clock in the forenoon of the same day if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done on the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Learned Hand, Judge of the said Court, at the City of New York, in the Southern District of New York, this 10th day of March, in the year of our Lord, one thousand nine hundred and nineteen, and of our Independence one hundred and forty-third.

ALEX. GILCHRIST, Jr.,
Clerk.

FRANCIS G. CAFFEY,
United States District Attorney.

22 *Marshal's Return.*

In Obedience to the within Monition, I have attached the securities named herein (with the exception of certain coupons not cashed on debentures of the N. Y., N. H. & Hartford R. R. amounting to $1,575 and the German Imperial Government amounting to $10,000) on March 12, 1919, in the hands of the National Park Bank at Broadway and Fulton Street, New York City, New York, and have given due notice as appears by the proof of publication hereto annexed to all persons claiming the same that this Court will on the 31st day of March, 1919, inst. (if that shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

The securities referred to herein are in a vault at National Park Bank, United States Marshal having possession of the keys to said vault.

THOMAS D. McCARTHY,
United States Marshal, S. D. N. Y.

I hereby certify that on the 10th day of March, 1919, at the City of New York in my District, I served the within Monition upon the National Park Bank by exhibiting to Frederick O. Foxcroft, as Assistant Cashier of National Park Bank, at Broadway and Fulton Street, the Within original and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated March 24, 1919.

23 *Claim.*

District Court of the United States, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

And Now Walter T. Rosen, owner of the said $25,000 par value Chesapeake & Ohio 4½% Convertible Bonds, and other bonds, stocks and other securities more fully described in Exhibit A annexed to the libel herein, intervening for the interest of himself J. Markham Marshall and Rudolf Metz, as co-trustees and joint owners of the said bonds, stocks and other securities, appears before this Honorable Court and makes claim to the said bonds, stocks and other securities as the same are attached by the Marshal under process of this Court, at the instance of Francis P. Garvan as Alien Property Custodian, and the said Walter T. Rosen avers that he and his said co-trustees and joint owners were in possession of the said bonds, stocks and other securities at the time of the attachment thereof, and that he and J. Markham Marshall and Rudolf Metz are the true and bona fide owners of the said bonds, stocks and other securities

24 and that no other person is the owner thereof.

Wherefore they pray to defend accordingly.

WALTER T. ROSEN.

Sworn to and subscribed this 28 day of March, 1919, before me.

CLINTON DE R. COMBES,
Notary Public, Nassau County.

Certificate filed in New York County, 198, New York County Register's No. 10165.

Commission Expires March 30, 1920.

ROOT, CLARK, BUCKNER & HOWLAND,
Proctors for Claimants.

Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, New York City.

City and County of New York,
Southern District of New York, ss:

Walter T. Rosen, being duly sworn, says that he is a co-trustee of Rudolf Metz and J. Markham Marshall, acting under a certain trust deed executed and delivered on March 13, 1911, by the Munich Re-Insurance Company, a German corporation, under which trust deed the bonds, stocks and other securities against which this suit has been commenced were held by him and his said co-
25 trustees for the benefit of policy-holders and creditors of said corporation in the United States; that for the purposes of this suit deponent is duly authorized by his said co-trustees to put in this claim.

WALTER T. ROSEN.

Sworn to before me this 22 day of March, 1919.
CLINTON DE R. COMBES,
Notary Public, Nassau County.

Certificate filed in New York County 198.
New York County Register's No. 10165.
Commission expires March 30, 1920.

26 *Answer.*

United States District Court, Southern District of New York.

Francis P. Garvan, as Alien Property Custodian, Libellant,

against

$25,000 Par Value of Chesapeake & Ohio Railway 4½% Convertible Bonds, and Other Bonds, Stocks and Other Securities.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

J. Markham Marshall, Walter T. Rosen and Rudolph Metz as trustees under a certain trust deed hereinafter described, owners and claimants of the $25,000 par value of Chesapeake & Ohio Railway 4½% Convertible Bonds, and the other bonds, stocks and securities proceeded against by Francis P. Garvan, as Alien Property Custodian, in this proceeding, answer said libel of information and complain as follows:

1. The claimants admit that the petitioner is the Alien Property Custodian of the United States, duly appointed and qualified as such, pursuant to the provisions of the "Trading with the Enemy Act," approved October 6, 1917, and the amendments thereto,
27 and the executive orders and proclamations issued thereunder.

Further answering the paragraph marked "1" of the libel of in-

formation the claimants deny that in making the demands of October 28, 1918, November 18, 1918, February 12, 1919, and March 7, 1919, hereinafter mentioned, the said petitioner was acting pursuant to the provisions of said Act but allege on the contrary that he was acting outside of and in abuse of the authority conferred upon him by said Act.

2. The claimants admit that the said petitioner made the determination specified in the paragraph marked "2" of the said libel of information, but deny that such determination was made after investigation and they deny that such determination was made pursuant to the authority of said "Trading with the Enemy Act."

3. On information and belief, the claimants admit that the said petitioner did require from the National Park Bank that the securities set forth in Exhibit "A," annexed to the said libel of information be transferred, assigned and delivered over to him as Alien Property Custodian, but they deny that such requirement was made after investigation or under the authority vested in him under the "Trading with the Enemy Act."

4. The claimants admit that the libellant attempted to seize the said securities as alleged in the Paragraph marked 4 of the said libel of information, but deny that such attempted seizure was under the authority of the "Trading with the Enemy Act" or that any of said securities were in the possession of the National Park Bank or were withheld from libellant by said bank.

28 5. The claimants admit all the allegations contained in paragraph marked "5" of the said libel of information.

6. The claimants admit the jurisdiction of this court, but deny each and every other allegation contained in the paragraph marked "6" of said libel of information.

7. The claimants deny each and every allegation contained in the paragraph marked "7" of said libel of information.

8. The claimants admit the jurisdiction of this court, but deny each and every other allegation contained in the paragraph marked "8" of said libel of information.

The Claimants further answering allege:

9. That by Chapter 205, Title Twenty-five of the General Statutes Revision of 1902, of the State of Connecticut, approved June 11, 1901, and becoming effective on July 1, 1902, it was provided among other things, as follows:

"Sec. 3500. Limitation of risks taken by company. No fire insurance company doing business in this state shall expose itself to loss on any one risk to an amount exceeding ten per cent. of its paid-up capital and surplus, but in determining the amount of such risk no portion thereof which shall have been reinsured in any corporation or corporations authorized to do insurance business in this state shall be included."

"Sec. 3569. Examination of affairs and officers. The insurance commissioner, either personally or by a committee appointed by him, consisting of one or more persons not directors, officers, or agents of any fire or fire and marine insurance company doing business in this state, may at any time examine into the affairs of any fire or fire and marine insurance company incorporated by or doing business in this state. The officers or agents of such company shall exhibit its books to said commissioner or committee, and otherwise facilitate such examination; the commissioner or committee may examine under oath the officers and agents of any such company in relation to its affairs. Said commissioner may publish the result of such investigation in one or more newspapers published in this state. In relation to the affairs of any company incorporated by or organized under the laws of any other state of the United States, he may, in lieu of such investigation, accept the certificate of the insurance commissioner or superintendent of such state, as to its condition. Whenever the commissioner shall ascertain that the assets of any fire or fire and marine insurance company incorporated by this state, after deducting for reinsurance and its other proper liabilities, excepting capital, amount to less than three-fourths of its capital stock, if it have a stock capital, or in the case of a mutual company, if the assets, less the unsettled claims and other absolute liabilities, amount to less than three-fourths the sum requisite for reinsurance, he shall call upon it to make up such deficiency within such reasonable time as he shall fix, and on failure to comply with such requirement shall bring his petition to a judge of the superior court, praying for an injunction restraining said company from the further prosecution of the business of making or renewing insurance until said deficiency is made up; and if, upon a hearing before said judge, after such reasonable notice to such company as may be ordered, the allegations contained in such petition shall be found true, such judge shall issue such injunction."

10. That by Chapter 206, Title Twenty-five of the General Statutes, Revision of 1902 of the State of Connecticut, approved June 11, 1901, and becoming effective on July 1, 1902 it was provided, among other things as follows:

"Sec. 3518. Term 'Foreign insurance company' defined. The term 'foreign insurance company' shall include any company corporation, association, partnership, or individual of any foreign country doing insurance business in this state."

"Sec. 3519. When foreign fire insurance company may transact business here. No foreign fire insurance company shall take risks in this state unless it has a cash capital of two hundred thousand dollars, and shall have made a deposit with the treasurer of this state or with the proper officer of some other state of not less than two hundred thousand dollars in securities authorized by law for investments by savings banks, in trust for the benefit of its policyholders in the United States; and no policy issued by such com-

pany to any citizen of this state shall be invalidated by the occurrence of hostilities between the government of the United States and the government under the laws of which it was organized.

"Sec. 3520. Information to be furnished commissioner. Every foreign insurance company shall, before admission to do business in this state, furnish to the insurance commissioner a copy of its charter or articles of association, of its last annual report made in the country where it was organized, and the certificate of the officer holding in trust said deposit of two hundred thousand dollars, stating the manner in which the same is invested and the purposes for which the same is held; and it shall furnish annually to the insurance commissioner, a statement of the condition of its affairs in the United States, in such form as he shall require."

"Sec. 3521. Amount of capital, how estimated. The capital of every such foreign insurance company shall, for all the purposes of the insurance laws of this state, be the aggregate value of its assets or securities deposited as aforesaid, and all sums loaned on real estate security in any state in the United States, in conformity with the laws of such state providing for the investment of the assets of insurance companies therein, and all other assets in the United States in which fire insurance companies organized under the laws of this State may invest; provided such real estate securities and assets shall be held in the United States by trustees who are citizens of the United States approved by the insurance commissioner, for the benefit of all its policyholders and creditors in the United States, after making the same deduction from such aggregate value for losses and liabilities in the United States and for premiums upon risks therein not expired, as is authorized or required by the laws of this state, or by the regulations of its insurance department, with respect to fire insurance companies organized under the laws of this state."

"Sec. 3522. Appointment of trustees. The trustees referred to in Sec. 3521 shall be appointed by the directors of such company, and a certified copy of the vote by which they are appointed and of the deed of trust shall be filed in the office of the insurance commissioner; and he may examine such trustees or the agents of such company, under oath, and its assets, books, and accounts, in the same manner as he may examine the officers, agents, assets, books and accounts, of any company authorized to do fire insurance business in this state."

"Sec. 3523. Conditions precedent to transaction of business. No foreign insurance company, or agent or attorney thereof, shall transact the business of fire insurance in this state until such company shall have complied with the laws of this state relative to foreign insurance companies, and received a license or certificate of authority from the insurance commissioner; nor shall such companies make contracts of insurance on property in this state except through lawfully constituted and licensed resident agents."

"Sec. 3524. Limitation of risks. No foreign insurance company shall insure against loss by fire or inland navigation, nor expose itself to any such loss by any one risk, for any greater
33 amount in proportion to its capital than companies which are organized under the laws of this state."

"Sec. 3525. License to transact business. When a foreign insurance company shall have complied with the provisions of law relating to such companies, and the insurance commissioner is satisfied that it is solvent in the United States, he may issue to it a license to transact business in this state, upon the payment of thirty dollars for filing a certified copy of its charter or deed of settlement and annual fees as follows: License fee, fifty dollars; fee for filing statement, twenty dollars, and two dollars for each agent's certificate of authority."

11. That at all the times hereinafter mentioned prior to July 1, 1918, the said statutes of the said State of Connecticut were in full force and effect.

12. That the provisions of said Sections 3509 and 3569 of the Statutes of Connecticut hereinabove set forth were incorporated in and are a part of the General Statutes of Connecticut, Revision of 1918, in effect July 1, 1918, and are therein numbered Sections 4078 and 4086, respectively, of Chapter 210 of Title 35 of said Revision. That the provisions of said Sections 3518, 3519, 3520, 3521, 3522, 3523, 3524 and 3525 of said Connecticut statutes hereinabove set forth were incorporated in and are now a part of the said General Statutes of Connecticut and are therein numbered Sections 4101, 4102, 4103, 4104, 4105, 4106, 4107 and 4108 re-
34 spectively of Chapter 212 of title 35 of said Revision; that at all the times hereinafter mentioned the said provisions of said Statutes of Connecticut were and now are in full force and effect.

13. That at all the times hereinafter mentioned the Munich Re-Insurance Company was and now is a corporation organized and existing under and by virtue of the laws of the Kingdom of Bavaria, Empire of Germany, and that in or about the month of March, 1911, said Munich Re-Insurance Company commenced to transact business in the State of Connecticut and thereby became subject to the Statutes aforesaid.

14. That for the purpose of establishing a suitable capital within the United States pursuant to the provisions of said Section 3521 of the Statutes of the State of Connecticut and thus enabling it to issue substantial risks without violating the provisions of said Sections 3509 and 3524 of said Statutes, and for the purpose of securing the policy holders and creditors in the United States of the said Company pursuant to the said statutes, the Munich Re-Insurance Company on or about March 13, 1911, duly executed and delivered a certain trust deed wherein and whereby Ernst Thalmann, Isaac N. Seligman and Hermann Sieleken, all citizens

of the United States and residents of the State of New York, were appointed trustees thereunder. A copy of said trust deed is hereto annexed, marked "Exhibit 1" and made a part hereof. That the said trustees accepted the trusts created by said trust deed and filed the said trust deed with the Insurance Commissioner of the State of Connecticut. That the claimants are the duly appointed
35 successors of the trustees originally named in said trust deed and that the said trust deed is now in full force and effect.

15. That pursuant to the terms of said trust deed and of said Statutes the said Munich Re-Insurance Company assigned, transferred and conveyed to the said trustees therein named, certain cash, bonds and stocks to be held by them in trust for its policy holders and creditors in the United States and that the securities proceeded against in this action *and* a part of the securities so assigned, transferred and conveyed.

16. That the said Munich Re-Insurance Company has engaged in the insurance business in the said State of Connecticut and in other states of the United States and entered into many agreements, treaties and contracts re-insuring the risks assumed by various persons, firms, associations and corporations in the United States. On information and belief, that the persons, firms, associations and corporations in the United States who have thus re-insured risks with the said Munich Re-Insurance Company have relied upon the protection and security afforded by the said trust deed and the property assigned transferred and conveyed to the said trustees pursuant thereto, the terms of said trust deed having been made public through filing a copy thereof with the Insurance Commissioner of the State of Connecticut, and the amount and character of the securities held by the trustees having been made public from time to time by publication of the facts with respect thereto in the annual statements of said Munich Re-Insurance Company and in the annual reports of said Insurance Commissioner.

36 17. That the cash and securities so assigned, transferred and conveyed to the said trustees, at all times herein mentioned were in the possession, custody and control of the said trustees.

18. The claimants allege on information and belief that many claims against the Munich Re-Insurance Company by policy holders and creditors in the United States have accrued, are now outstanding and unpaid. That claimants cannot state the exact amount of these claims but allege, on information and belief, that the amount of the said claims which have not only accrued but as to which demands for payment have been presented to the said company aggregate more than $400,000. That the amount of said claims which have thus accrued can be ascertained only by an inspection of the books of said company which the claimants allege on information and belief, are in the possession of the Alien Property Custodian.

19. The claimants allege on information and belief that the said Munich Re-Insurance Company has heretofore entered into a large number of valid agreements, treaties and contracts with persons, firms, associations and corporations in the United States re-insuring risks assumed by such persons, firms, associations and corporations amounting altogether to a very large total sum. The claimants are unable to set forth exact figures as to the amount of these risks for the reason that they have not access to the books and records of the said Munich Re-Insurance Company. That under the terms and provisions of said agreements, treaties and contracts the said Munich Re-Insurance Company is liable for any and all losses occurring or which may have occurred during the periods
37 covered by such agreements, treaties and contracts, and claims based upon such losses may be lawfully enforced by persons within the United States notwithstanding the termination of such agreements, treaties and contracts. That by reason of these facts it is not now possible to ascertain or state the full amount of claims against the said company which may be lawfully asserted and enforced by policy holders and creditors of the said Munich Re-Insurance Company within the United States. But the said claimants allege, on information and belief, that the total amount of the risks thus insured against is far in excess of the total value of the said cash and securities so held by the said trustees and that the claims arising under such agreements, treaties and contracts, which have accrued or which may accrue and become and be enforceable in favour of persons within the United States against the said Munich Re-Insurance Company and thus entitled to the security of the said trust funds may aggregate an amount equal to or in excess of the total value of all the said trust funds, including the securities libelled in this proceeding.

20. That the policy holders and creditors in the United States of the said Munich Re-Insurance Company have a claim on the trust fund held by the said claimants under the said trust deed for the security and protection of their claims against said Company. That by reason of the character of the obligations assumed by said Munich Re-Insurance Company as aforesaid, it is not now possible and in all probability it will not be possible within six months after the end of the war for the said policy holders and creditors to ascertain the amount of their claims against said Munich
38 Re-Insurance Company and to demand payment thereof from the said Company.

21. That on or about April 25, 1917, the Insurance Commissioner of the State of Connecticut prescribed certain rules for the purpose of regulating the business of branch establishments of insurance companies corporated under the laws of the German Empire and which were engaged in the transaction of business in the United States and had their principal office in the State of Connecticut. That the said rules were so prescribed under the authority of a Presidential Proclamation promulgated April 6, 1917, a copy of which proclamation is hereto annexed marked "Exhibit 2" and

made a part hereof. The said rules provide, among other things as follows:

"7. The United States Trustees shall not disburse any funds or make any investments, or sell, remove or transfer any securities without previous notice in writing to the Insurance Commissioner as aforesaid, at the above address. Such funds and securities shall be subject to the joint control of said Commissioner, or some one whom he may designate in writing and the parties, who but for these rules and regulations would be entrusted with their custody. A copy of these rules shall be furnished to each of said Trustees."

22. Thereafter the claimants in this action duly received from the said Commissioner a true copy of the said rules. A copy of said rules is hereto attached marked "Exhibit 3" and made a part hereof.

39 23. That prior to October 28, 1918, A. Mitchell Palmer was duly appointed Alien Property Custodian under the provisions of the Act of Congress entitled "Trading with the Enemy Act," approved October 6, 1917, and the amendments thereto and the executive orders and proclamations issued pursuant thereto, and duly qualified and acted as such Alien Property Custodian.

24. That on or about October 31, 1918, the said A. Mitchell Palmer, as Alien Property Custodian, served on Gustave A. Zieman, Assistant Secretary of said Munich Re-Insurance Company at the City of Hartford in the State of Connecticut, a demand dated October 28, 1918, and addressed to Carl Schreiner, Manager, of said Munich Re-Insurance Company and the said claimants, as trustees. By such demand the Alien Property Custodian required the trustees to turn over to him the property held in trust "in excess of the amount required for the purposes of such trust." A copy of said demand marked "Exhibit 4" is hereto annexed and made a part hereof.

25. That thereafter on November 11, 1918, the said claimant trustees held a meeting for the purpose of considering the demand of the Alien Property Custodian. That at said meeting the trustees found it impossible to ascertain the amount of "securities or properties in excess of the amount required for the purposes of said trust," as required by the demand of the Alien Property Custodian and it was therefore impossible to comply with said demand in accordance with the terms thereof. The trustees thereupon determined to seek advice of counsel as to their duty in the premises and they
40 notified the Alien Property Custodian of this determination.

26. That on or about November 18, 1918, the said A. Mitchell Palmer as Alien Property Custodian served on the said claimant trustees a demand under date of November 18, 1918. By such demand the Alien Property Custodian required the trustees to turn over to him all property therein determined by him to belong to the Munich Re-Insurance Company. A copy of said demand marked "Exhibit 5" is hereto annexed and made a part hereof.

27. The said claimant trustees consulted with Elihu Root and were advised by him that they were not at liberty to comply with the said demand. A copy of said opinion is hereto annexed marked "Exhibit 6" and made a part hereof.

28. That thereafter and during the month of December, 1918, the claimant trustees notified the Insurance Commissioner of the State of Connecticut of the demand of the said A. Mitchell Palmer as Alien Property Custodian and requested him to exercise the powers conferred upon him by the said statutes of the State of Connecticut to examine into the affairs of the said Munich Re-Insurance Company with a view to determining whether there was any excess of securities held by the said claimant trustees over the amount which the said statutes required them to hold. A copy of said letter is hereto annexed marked "Exhibit 7" and made a part hereof. That the said Insurance Commissioner has made no reply to the said request of the claimants.

41 29. That on or about February 12, 1919, the said A. Mitchell Palmer served upon the claimant trustees a paper by which he purported to seize and demand the payment, assignment and delivery of all of the properties held in trust by them as aforesaid, including as a part thereof the properties described in this libel of information herein. A copy of said demand marked "Exhibit 8" is hereto annexed and made a part hereof.

30. The claimants allege, on information and belief, that on March 7, 1919, the said libellant demanded from Ladenburg, Thalman & Co., that they transfer, assign, deliver and pay over to him as Alien Property Custodian the securities and properties held by said claimants under said trust deed, to be by him administered and accounted for as provided by law. A copy of said demand marked "Exhibit 9" is hereto annexed and made a part hereof.

31. That under and by virtue of the said deed of trust (Exhibit 1) and the provisions of the Statutes of the State of Connecticut hereinabove set forth, the claimant trustees at all the times herein mentioned were and now are the holders of a lawful right in the nature of security in the property so assigned, transferred and conveyed to them for the payment and satisfaction of the claims of the policy holders and creditors in the United States hereinabove described, and that said property by the terms of said trust deed was to be disposed of and appropriated to the payment and satisfaction of the claims of said policy holders and crediters. That by reason of these facts the claimant trustees, under the express provisions of Section 8 (*a*) of
42 said "Trading with the Enemy Act" have a right to continue to hold the property libelled in this proceeding.

32. That under the provisions of the said "Trading with the Enemy Act" a person whose property is sought to be seized by the Alien Property Custodian, is entitled to notice and a fair hearing to defend his rights. That the said Alien Property Custodian has not at any time notified the said claimant trustees that he intended to

hold an investigation for the purpose of determining whether the securities held by the said claimant trustees under said trust deed and against which this proceeding was brought, were owing or belonging to or held for, by, on account of or on behalf of or for the benefit of an enemy or ally of enemy not holding a license granted by the President. The said Alien Property Custodian has not at any time given the claimant trustees an opportunity of presenting to him for his consideration the claims of the said claimant trustees in respect to the said securities or any evidence in support of their said claims. That any determinations made by the said Alien Property Custodian in respect to said securities have therefore been made arbitrarily, in that said claimant trustees have been deprived of any notice of an investigation to be held in the premises by the Alien Property Custodian and have been deprived of an opportunity of a fair hearing or of presenting evidence to the Alien Property Custodian in support of their claims to said securities.

33. The claimants allege that the action of the said Alien Property Custodian in making the said demands of October 28,
43 1918, November 18, 1918, February 12, 1919, and March 7, 1919, hereinbefore referred to was arbitrary, in excess of his authority under the "Trading with the Enemy Act" or under the said proclamations and executive orders relating thereto, and that the said action was therefore void because an investigation of the facts such as is required by Section 7 (*c*) of the said "Trading with the Enemy Act" could not have failed to disclose to the Alien Property Custodian the facts hereinabove set forth, viz.: That the said trust funds including the funds libelled in this proceeding were in fact and in law held by the said claimant trustees not for the benefit of the Munich Re-Insurance Company as alleged by the said Alien Property Custodian but for the benefit of policy holders and creditors within the United States pursuant to the Statutes of the State of Connecticut and the trust deed herein referred to and set forth. That neither under the said Statutes of the State of Connecticut nor under the said trust deed nor under the provisions of the said "Trading with the Enemy Act" could the claimant trustees have turned over a single dollar's worth of the said trust funds to the said Munich Re-Insurance Company; that the said determinations of the said Alien Property Custodian that the securities against which this libel of information was filed belonged to and are held for, by, on account of, on behalf of or for the benefit of the Munich Re-Insurance Company are unsupported by any evidence and are directly contrary to the previous determination under date of October 28, 1918.

34. That the said Alien Property Custodian at the times of the several demands hereinbefore referred to, knew that the
44 claimant trustees held a lawful right in the nature of security in the bonds and stocks herein libelled; that under the provisions of Section 8 (*a*) of said "Trading with the Enemy Act" the said claimant trustees were and are expressly authorized to continue to hold the said bonds and stocks; that the said Alien Property Cus-

todian had no power or authority to require the said claimant trustees or any other person to transfer, assign, deliver and pay over to him the said bonds and stocks, and that in making the said demands of October 28, 1918, November 18, 1918, February 12, 1919, and March 7, 1919, the said Alien Property Custodian acted in excess of and in abuse of the power and authority conferred upon him by the said Act.

35. That all the facts with respect to the securities herein libelled and the trust deed under which the said securities were held by the claimant trustees were and are undisputed and were and are known to the said Alien Property Custodian and the said determinations of the said Alien Property Custodian were determinations of a question of law.

36. The claimants allege that the securities herein libelled are not money or property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy, and that therefore, the Alien Property Custodian was without power, authority or jurisdiction, even after investigation to make the determinations in respect to said securities hereinbefore set forth and to require the said claimant trustees or any other person to convey, transfer, assign, deliver and pay over to him the said securities.

45 37. The claimants further allege that on or about March 4, 1919, the said claimants J. Markham Marshall and Rudolf Metz brought an action for an accounting in the Supreme Court of the State of New York, New York County, in which the Munich Re-Insurance Company, A. Mitchell Palmer as Alien Property Custodian, the claimant Walter T. Rosen, as trustee under the said trust deed, all persons, firms, associations and corporations known to have claims against the Munich Re-Insurance Company, and all unknown persons, firms, associations and corporations who, individually or in any fiduciary capacity, as policy holders or otherwise had or claimed to have, or had had such business transactions with the said Munich Re-Insurance Company that they might then have or at some future time might have, or might claim to have, some right against the claimants as such trustees, or some right or interest, legal or equitable, against, in or in respect of the said trust fund, were named as defendants. That the complaint in said actions set out the account of said claimants as trustees and prayed that the said account be passed by and under the direction of the said court and that the said court by its decree discharge the said claimants as such trustees from all liability, responsibility and accountability for their acts and doings as such trustees and that the said court make its decree as to the disposition of the funds and assets in the control of the said trustees, and the complaint further prayed that the court instruct the said claimants as to whether, pending the judicial settlement of their accounts they should transfer, assign, deliver and pay over the moneys, securities and property in their hands and the properties herein libelled to the said A. Mitchell

Palmer as Alien Property Custodian. A copy of said com-
46 plaint is hereto annexed marked "Exhibit 10" and made a part hereof.

38. That on March 3, 1919, the said claimants delivered a copy of the summons and complaint in the said action for an accounting to Alexander Kenney, an assistant counsel of the Alien Property Custodian in New York City and thereafter and on or about March 4, 1919, requested the Alien Property Custodian to appear voluntarily in the said action. That the said Alien Property Custodian has made no reply to the claimants' said request.

39. That the securities herein libelled are trust funds. That all the interests therein are equitable in their nature. That the amount of the claims in respect of said funds cannot be ascertained and the respective rights and interest therein cannot be determined, and the trustees cannot be discharged or protected in the administration of said fund except by the decree of a court of equity in a suit for an accounting and discharge in the nature of the said suit heretofore commenced by the trustees.

40. That all and singular the premises are true.

Wherefore claimants pray that said libel of information may be dismissed with costs and that the order heretofore made herein directing the Marshal of the Southern District of New York to seize and take possession of the securities mentioned in Exhibit A annexed to said libel of information be vacated; that the court make and enter an order restoring the said securities to the custody of these claimants, and for such other order or relief in the premises
47 as to the court shall seem just.

J. MARKHAM MARSHALL,
WALTER T. ROSEN,
RUDOLF METZ,
Claimants.

ROOT, CLARK, BUCHNER & HOWLAND,
Proctors for Claimants.

Office & P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Walter T. Rosen, being duly sworn, says that he is one of the claimants named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated on information and belief and that as to those matters he believes it to be true.

WALTER T. ROSEN.

Sworn to before me this 10th day of April, 1919.

CLINTON DE R. COMBES,
[SEAL.] *Notary Public, Nassau County.*

Certificate filed in New York County 198; New York County Register's No. 10165.

Commission expires March 30, 1920.

48 EXHIBIT 1.

This Indenture, made the thirteenth day of March in the year one thousand nine hundred and eleven, between the Munich Re-Insurance Company of Munich, in the Kingdom of Bavaria, Germany, hereinafter called the "Company," party of the first part, and Mr. Ernest Thalmann, Mr. Isaac N. Seligman and Mr. Hermann Sielcken, of New York, all citizens of the United States, parties of the second part.

Witnesseth:

Whereas it was enacted in and by a certain Act or Acts of the Legislature of the State of Connecticut, entitled, "Laws relating to Insurance and Insurance Companies, General Statutes Chapter 206, especially relating to Foreign Insurance Companies" that under:

"§3521. Amount of Capital, How Estimated. The capital of every such foreign insurance Company shall, for all the purposes of the insurance laws of this state, be the aggregate value of its money or securities deposited as aforesaid, and all sums loaned on real estate security in any state in the United States, in conformity with the laws of such state providing for the investment of the assets of insurance companies therein, and all other assets in the United States in which fire insurance companies organized under the laws of this state may invest; provided such real estate securities and assets shall be held in the United States by trustees who are citizens of the
49 United States approved by the insurance commissioner for the benefit of all its policyholders and creditors in the United States, after making the same deduction from such aggregate value for losses and liabilities in the United States, and for premiums upon risks therein not expired as is authorized or required by the laws of this state, or by the regulations of its insurance department, with respect to fire insurance companies organized under the laws of this state."

and that under:

"§3522. Appointment of Trustees. The trustees referred to in §3521 shall be appointed by the directors of such company, and a certified copy of the vote by which they are appointed and of the deed of trust shall be filed in the office of the insurance commissioner; and he may examine such trustees or the agents of such company, under oath, and its assets, books, and accounts in the

manner as he may examine the officers, agents, assets, books, and accounts, of any Company authorized to do insurance business in this State."

And Whereas the said Company is a foreign Insurance Company, duly organized and existing under the laws of the Kingdom of Bavaria, Germany, and carrying on the business of re-insurance in the said State of Connecticut and elsewhere in the United States, by the Resident Manager in said City of Hartford; Now therefore, to the end that the aforesaid statute of the State of Connecticut may be fully complied with:

50 Know all Men by these Presents that the said Company doth hereby constitute and appoint Mr. Ernest Thalmann, Mr. Isaac N. Seligman, and Mr. Hermann Sieleken of New York, the parties hereto of the second part, and their successors appointed in the manner hereinafter provided, Trustees for the purposes hereinafter stated, and upon the trusts, covenants, agreements, and provisions hereinafter declared and set forth.

First. The said Trustees shall receive, hold, possess, and safely keep all assets and property of every kind and description which shall from time to time hereafter be delivered to them by the Company, the same to be held, used and appropriated to and for satisfying the purposes in the act of the Legislature above mentioned to be held in trust for the Company.

Second. The Trustees shall give proper receipts and vouchers to the Company for all the property so from time to time delivered to them by the Company, and the said Trustees shall keep a full and accurate record, inventory, and account of the said property so received, and of all their transactions in relation to the same, which record, inventory, and account shall at all times be open to the inspection of the Company, its duly authorized agent or agents; and the said Trustees shall from time to time, as they may be required, render and deliver to the Company in such form as its Board of Directors may from time to time prescribe, a true, full, and just account of the business of the said trust, and of all the property held under the same.

51 Third, the Trustees shall have power (with the previous consent of the Company), to invest and re-invest from time to time the property so as aforesaid delivered in trust, and to this end they shall have power (with such consent as aforesaid) to make all necessary sales, conveyances, assignments, and transfers, and no purchaser shall be obliged to see to the application of the purchase money. It shall be the duty of the Trustees from time to time to make such investments, purchases, sales, conveyances and assignments as they may be requested to make by the said Company. The current interest and income of the said trust property, as it accrues and is received by the Trustees, shall be paid by them to the Company through its bankers in the City of Hartford.

Fourth. If at any times debts and liabilities for the security of which this trust is created, shall accrue and become due and payable by the Company, and shall not be otherwise satisfied and paid, the Trustees shall have power to appropriate so much of the said trust property as may be necessary to the payment and satisfaction thereof, but no alleged debt or liability shall be so paid or satisfied unless and until the amount and validity of the said alleged debt or liability in each case shall have been admitted by the Company, or until the validity and amount thereof have been established by the claimant in due course of law.

Fifth. The Trustees shall permit the Company from time to time, if and as occasion shall require, to withdraw such proportion of the said trust property as the Company may require for the pur-
52 pose of making a deposit in any other State or States as a basis for carrying on the business of insurance in such State or States, in compliance with the law thereof, and shall deliver to the Company so much of the trust property as may be required for such purpose.

Sixth. All vacancies occurring in the trust hereby created, from any cause whatever, shall and may be filled by the appointment by the Company of a successor or successors to the said trust, and the Trustee so appointed, upon accepting such appointment, without further act or deed shall have and possess all the estate, rights and powers conferred upon the said Trustees, respectively named in this instrument, in and by the provisions thereof, and shall be subject to all the duties imposed upon such Trustees respectively.

Seventh. The said Trustees, parties of the second part, and their successors, may at any time resign, and the vacancy created by every such resignation shall and may be filled by the Company, and the said Company shall have the power at any time, from time to time, without assigning any cause therefor, to remove any one or more of the said Trustees or their successors, by notice of such removal in writing, and thereupon the said Company shall and may, at any time or times thereafter, appoint a successor or successors to the said Trustee or Trustees so removed.

Eighth. The said Trustees and their successors shall be liable respectively only for their own neglect and misfeasance, and not for the neglect or misfeasance of each other.

53 Ninth. After making due provision for the purposes aforesaid and subject to the provisions hereinbefore contained, the Trustees shall stand possessed of the said trust fund, at the control and subject to the order of the Company, and shall and will use and dispose of the same as the Company may direct or appoint. But it is hereby expressly declared and provided, that until all the outstanding liabilities and obligations of the Company, absolute or contingent, to policyholders or creditors in the United States, are fully paid and discharged, the said trust fund, or so much thereof as may be necessary to cover the outstanding liabilities shall remain in the

possession of the said Trustees, for the security and protection of the said policyholders and creditors, anything herein contained to the contrary notwithstanding.

Tenth. The Company reserves to itself the right hereafter to add to, alter, modify, or revoke the trusts, conditions, and powers hereby declared, imposed, or conferred, in such manner as its Board of Directors may by resolution determine, and as shall be according to law, provided that the rights of its policyholders and creditors in the United States shall not be thereby impaired.

In witness whereof, the Company have hereunto affixed their common seal, and the said parties hereto of the second part, have hereunto set, their hands and seals the day and year first above written.

On behalf of the

MUNICH RE-INSURANCE COMPANY.

Sig.: CARL THIEME,
President.

" PAUL SZELINSKI,
Secretary.

54 UNITED STATES CONSULATE GENERAL,
Munich, Bavaria, ss:

On this 13th day of March, 1911, before me personally came Mr Carl Thieme, President, and Mr. Paul Szelinski, Secretary of the Munich Re-Insurance Company with whom I am personally acquainted, who being by me duly sworn said that they resided in the City of Munich; that Mr. Thieme was President and Mr. Szelinski was Secretary of the Munich Re-Insurance Company, that they knew the corporate seal of said Munich Re-Insurance Company, that the seal affixed to the annexed conveyance was such corporate seal, that it was affixed by order of the Board of Directors of said Munich Re-Insurance Company and that they signed their names thereto by the like order as President and Secretary of said Munich Re-Insurance Company.

Witness my hand and the seal of this Consulate General the day and year first above given.

(Signed) ABRAHAM SCHLESINGER,
Vice & Deputy Consul General of the United
[L. S.] *States of America at Munich, Bavaria.*

No. 241.
Fee M 8.50.
— $2.00.

Exhibit 2.

[Agencies in the United States of German Insurance Companies.]

By the President of the United States of America.

A Proclamation.

Whereas, certain insurance companies, incorporated under the laws of the German Empire, have been admitted to transact the business of insurance in various States of the United States, by means of separate United States Branches established pursuant to the laws of such States, and are now engaged in business under the supervision of the Insurance Departments thereof, with assets in the United States deposited with Insurance Departments or in the hands of resident trustees, citizens of the United States, for the protection of all policyholders in the United States;

And whereas, the interests of the citizens of the United States in the protection afforded by such insurance are of great magnitude, so that it is deemed to be important that the agencies of such companies in the United States be permitted to continue in business;

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers vested in me as such, hereby declare and proclaim that such branch establishments of German Insurance Companies now engaged in the transaction of business in the United States pursuant to the laws of the several States are hereby authorized and permitted to continue the transaction of their business in accordance with the laws of such States in the same manner and to the same extent as though a state of war did not now exist; provided, however, that all funds of such establishments now in the possession of their managers or agents, or which shall hereafter come into their possession, shall be subject to such rules and regulations concerning the payment and disposition thereof as shall be prescribed by the insurance supervising officials of the State in which the principal office of such establishment in the United States is located, but in no event shall any funds belonging to or held for the benefit of such companies be transmitted outside of the United States nor be used as the basis for the establishment directly or indirectly of any credit within or outside of the United States to or for the benefit or use of the enemy or any of his allies without the permission of this Government.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this sixth day of April in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

WOODROW WILSON.

[SEAL.]

By the President:

ROBERT LANSING,
Secretary of State.

[No. 1366.]

57 EXHIBIT 3.

State of Connecticut.

Insurance Department.

Hartford, April 25, 1917.

Whereas, the President of the United States, on April 6th, 1917, authorized and permitted the Branch establishments of such insurance companies incorporated under the laws of the German Empire, as were then engaged in the transaction of business in the United States, pursuant to the laws of the several states, to continue the transaction of their business in accordance with the laws of such state, in the same manner and to the same extent as though a state of war did not exist, provided that all funds of such establishments, then in the possession of their managers or agents, or which should thereafter come into their possession, should be subject to such rules and regulations concerning the payment and disposition thereof, as shall be prescribed by the insurance supervising official of the state in which the principal office of such establishment in the United States is located.

Now, Therefore:

Know all men by these presents, that I, Burton Mansfield, Insurance Commissioner of the State of Connecticut, do hereby prescribe, for the purpose of regulating the business of such establishments which have their principal office in the State of Connecticut, the following

58 Rules and Regulations.

1. No money shall be disbursed except for administrative or agency expenses, or for settlements under policies or other contracts made by and between such companies and the other contracting parties thereto, through the United States Branches of said companies.

2. All disbursements must be made by check, draft, or letter of instructions, authorizing the same to be made, which must be duly countersigned or approved by the Insurance Commissioner of the

State of Connecticut, or by some person authorized thereto by him in writing.

3. Every department or branch office, belonging to any United States Branch, having power to disburse money for any purpose shall be subject to rules 1 and 2.

4. On every Monday a statement showing the cash income and the cash outgo, with cash balances in office and on deposit with banks for the week previous shall be mailed to the Insurance Commissioner of the State of Connecticut, at his office in the Capitol, at Hartford, Conn.

5. Monthly statements on suitable blanks shall be prepared and forwarded to said Insurance Commissioner at the above address, within thirty days after the close of each month.

6. Every bank in which any funds of said companies are deposited, or in which any moneys of any of the United States Branches of such companies, or in turn, of their branches or departments, shall be deposited, shall be at once notified by the United States Manager that no payment by such bank shall be made except as hereinbefore prescribed.

7. The United States Trustees shall not disburse any funds, or make any investments, or sell, remove or transfer any securities without previous notice in writing to the Insurance Commissioner aforesaid, at the above address. Such funds and securities shall be subject to the joint control of said Commissioner, or some one whom he may designate in writing and the parties, who but for these rules and regulations would be entrusted with their custody. A copy of these rules shall be furnished to each of said Trustees.

8. The Insurance Commissioner aforesaid, either by himself or his representative, shall inspect all books, accounts, documents and vouchers of the companies described, and of such United States Branches, whenever he shall see fit.

9. An agreement in writing shall be forthwith executed by the United States Manager of each of said companies above described whereby he shall specifically agree that in no event shall any funds belonging to or held for the benefit of such companies be transmitted outside of the United States, or be used as the basis for the establishment, directly or indirectly, of any credit within or outside of the United States, to, or for the benefit or use of the enemy or any of its allies, without the permission of the United States Government.

10. A copy of these rules and regulations shall be furnished to every person, company, or organization acting as agent of said companies herein described, and to every company or organization doing business with said companies.

11. These rules and regulation may be changed, altered and modified by the Insurance Commissioner of the State of Connecticut at any time. Reasonable notice shall be given of such change, alteration or modification.

Executed in duplicate on the day and year above written.

BURTON MANSFIELD,
Insurance Commissioner.

EXHIBIT 4.

Alien Property Custodian.

Washington,

D. C.

Trust 990
Report 1268

Demand by Alien Property Custodian for Property.

To Carl Schreiner, Manager, and Walter T. Rosen, Rudolph Metz and J. Markham Marshall, Trustees of and for the Munich Re-Insurance Company, 18 Asylum St., Hartford, Conn.:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Con-
61 gress known as the "Trading with the Enemy Act" approved October 6th, 1917, and the amendments thereto and the Executive Orders and Proclamations issued in pursuance thereof, by virtue of the authority vested in me by said Act and said Orders and Proclamations, after investigation do determine that The Munich Re-Insurance Company, whose address is Munich, Germany, is an enemy within the purview of said "Trading with the Enemy Act," and that pursuant to the provisions and conditions of the license issued to the said Company by the Secretary of the Treasury of the United States under the provisions of the said "Trading with the Enemy Act," you do have and hold in your custody or under your control, by virtue of a deed of trust and other powers granted by said Munich Re-Insurance Company and filed in the office of the Superintendent of Insurance of the State of New York, certain securities or other properties of the said Munich Re-Insurance Company, the value of which securities or properties exceeds the amount presently required by the terms and conditions of such deed of trust or by the statutes of the State of New York, having been released from the needs of business in the course of liquidation as provided by said license.

I, as such Alien Property Custodian, do hereby require that such securities or properties in excess of the amount required for the purposes of such trust shall be by you transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by
62 me held, administered, and accounted for as provided by law.

The State Bank and Trust Company is hereby designated as depositary and is authorized to receive for and on behalf of the Alien Property Custodian the securities or properties hereinbefore mentioned, and upon the service of this demand on you by said depositary you are directed to deliver the said securities and property to it forthwith.

Witness my hand and seal of office on this 28th day of October, 1918.

(Signed) A. MITCHELL PALMER,
Alien Property Custodian.

Served the foregoing Demand on the within named Munich Re-Insurance Company, at the office of said Corporation, 18 Asylum St., Hartford, Connecticut, by giving to Mr. Gustave A. Ziemen, Asst. Secy. of the said Corporation, a true and correct copy thereof, and by making known to him the contents thereof, this 31st day of October, 1918.

STATE BANK & TRUST CO.,
Depositary,
By GEO. H. BURT, *Vice Prest.*

63 EXHIBIT 5.

Trust No. I-996
Report No. 12682

Office of the

Alien Property Custodian.

Demand for Property.

To Carl Schreiner, as Manager, New York City, Walter T. Rosen, Rudolph Metz, as Trustees; J. Markham Marshall, The Superintendent of Insurance of the State of New York, The Superintendent of Insurance of the State of Ohio, and to all persons to whom this may concern:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto and the Proclamations and Executive Orders issued pursuant thereto, after investigation, do determine that the following money and other property to wit:

All and singular the money and other property, real and personal, tangible and intangible, rights, claims, titles, interests, effects and assets of every kind and description whatsoever,
64 wherever situated and operating within the United States as defined in the "Trading with the Enemy Act" and all incidents and appurtenances thereto, including the business as a going concern and the good will possessed, held and enjoyed by in the name of, or for, or on behalf of, the U. S. Dept. of the Munich Re-insurance Co., belong to and are held for, by, on account

of, on behalf of, or for the benefit of the said U. S. Dept. of the Munich Re-insurance Co., which Company, whose principal home office and address is Munich, Germany.

I, further after investigation, do determine to be an enemy, not holding a license granted by the President within the purview of said Act, Proclamations and Executive Orders, and I hereby require of you jointly, and each of you severally, that the said money and property shall be transferred, assigned, delivered and paid over to me, as Alien Property Custodian, to be by me held, administered and accounted for as provided by law; provided, however, that securities on deposit according to law with Insurance Officials of any State of the United States shall continue subject to all lawful conditions and terms of such deposit.

This demand is supplementary to any demand which may heretofore have been made upon you or any other with respect to such money and other property or any part thereof, and this demand shall not prejudice or affect any demand which has been or which may hereafter be made.

65 Witness my hand and seal of office, this eighteenth day of November, 1918.

(Sgd.) A. MITCHELL PALMER,
Alien Property Custodian.

Approved:
Bureau of Law
____ ____
____ ____

Referred for Signature:
Division of Insurance
____ ____
____ ____
Chief.

Service of the within Demand Accepted.

CARL SCHREINER,
As Manager of the Munich Reins. Co., United States Department, Hartford, Conn.
WALTER T. ROSEN, *Trustee.*
RUDOLPH METZ, *as Trustee.*
J. MARKHAM MARSHALL.
JESSE S. PHILLIPS,
Supt. of Ins., State of New York.

Served the within Demand on each of the above-named parties upon whom said Demand is made, by giving a true and correct copy thereof to such party and by making known to him the contents thereof.

Witness my hand this — day of November, 1918.

____ ____.

APC-MM-6719.

66 EXHIBIT 6.

December 10, 1918.

Walter T. Rosen, Esq., Trustee, &c.,
Ladenburg Thalmann & Company,
25 Broad Street,
New York City.

MY DEAR SIR:

You have asked my opinion upon the rights and duties of the United States Trustee of the Munich Re-insurance Company consequent upon a demand made by the Alien Property Custodian of the United States on the 28th of October 1918. This demand recites that you and your fellow trustees hold certain securities or properties of the Munich Re-insurance Company, the value of which exceeds the amount presently required by the terms and conditions of the trust deed or of the statutes of the State of New York, having been released from the needs of business in the course of liquidation, as provided by the license issued to the Company by the Secretary of the Treasury under the "Trading with the Enemy Act," and requires that such excess of the amount required for the purposes of the trust shall be by you transferred to him as Alien Property Custodian.

Your trust appears to have been constituted by a deed executed by the Munich Re-insurance Company March 13th, 1911, which quotes paragraphs 3521 and 3522 of the Connecticut statute entitled "Laws relating to Insurance and Insurance Companies, General Statutes, chapter 206." The deed recites that the Munich Re-
67 insurance Company is carrying on the business of re-insurance in Connecticut and elsewhere in the United States by a resident manager in the City of Hartford, and declares the deed to be made "to the end that the aforesaid statute of the State of Connecticut may be fully complied with." The first provision of the deed is that the trustees shall receive, hold, possess, and safely keep all assets and property delivered to them, "the same to be held, used, and appropriated to and for satisfying the purposes in the act of the Legislature above mentioned, to be held in trust for the Company."

To ascertain the primary duty of the trustees we must accordingly turn to the Connecticut statute to satisfy the purposes of which you hold the trust property.

We find in chapter 206 referred to by the trust deed the following provisions.—

Paragraph 3519. "No foreign fire insurance company shall take risks in this State unless it has a cash capital of $200,000, and shall have made a deposit with the Treasurer of this State or with the proper officer of some other State of not less than $200,000 in. securities, &c."

Paragraph 3521. "Amount of capital and how estimated. The "capital of every such foreign insurance company shall for all the

"purposes of the insurance laws of this State be the aggregate value "of its money or securities deposited as aforesaid and all sums loaned "on real estate security in any State in the United States, in con- "formity with the laws of such State providing for the investment "of the assets of insurance companies therein and all other assets "in the United States in which fire insurance companies organized "under the laws of this State may invest."

68 The same section proceeds to say:

"Provided such real estate securities and assets shall be held "in the United States by trustees who are citizens of the United "States approved by the insurance Commissioner for the benefit of "all its policy holders and creditors in the United States after "making the same deduction from such aggregate value for losses "and liabilities in the United States and for premiums upon risks "therein not expired as is authorized or required by the laws of "this State or by the regulations of its Insurance Department with "respect to fire insurance companies organized under the laws of "this State."

It appears by these provisions that all the invested assets of the Munich Re-insurance Company in the United States which have been delivered to you are a part of the capital of the Company, and you hold such invested assets in trust "for the benefit of all the policy holders and creditors of the Company in the United States subject however to certain deductions for losses and liabilities and unearned premiums."

The deductions are to be the same as those required by statute or the regulations of the Insurance Department with respect to fire insurance companies authorized under the laws of Connecticut.

The deductions authorized or required in case of Connecticut companies are to be found in section 3509 General Laws, which authorize examinations by the Insurance Commissioner, and pro- vide—

"Whenever the Commissioner shall ascertain that the assets of "any fire or fire and marine insurance company incorporated by this "State after deducting for re-insurance and its other proper
69 "liabilities, excepting capital, amount to less than three- "fourths of its capital stock,—if it have a stock capital.— " * * * he shall call upon it to make up such deficiency "within such reasonable time as he shall fix, &c., &c."

The liability for re-insurance is defined in section 3501 of the same statute.

It appears clearly enough by these provisions that the require- ments of Connecticut law for the safety of policy holders and cred- itors in the United States are not satisfied by retaining in the hands of trustees assets sufficient to cover all liabilities of the Company including the sums necessary for re-insurance, but the law requires that there shall also be retained a capital fund which in case of a

foreign insurance company includes all the invested assets of the Company in the United States.

It is to be observed that the provisions of section 3521, including as part of the capital of a foreign company all its invested assets in the United States is not merely formal or unimportant. It establishes the limitation upon the risks which the Company is authorized to take, for section 3524 and 3500 prohibit any single risk in excess of ten per cent. of the capital.

It follows that under the general provisions of your trust you are bound to retain all the assets in your hands either to meet liabilities, or as part of the capital of the Munich Re-Insurance Company, which the law of Connecticut requires to be held for the safety of security holders and creditors.

It remains to be seen whether there are any specific justifications for parting with any of this trust property. The trust deed
70 contains no such provisions, except in the 3rd article, provision for investment and re-investment, and for the payment to the Company of the income derived from the securities held; in the 4th article for the payment of debts on which the Company may default; in the 5th article for the withdrawal of "such proportion of the said trust property as the Company may "require for the purpose of making a deposit in any other State or "States as a basis for carrying on the business of insurance in such "State or States." By the 9th article it is only after making due provision for all the purposes of the trust that the trustees are to hold the fund subject to the order of the Company, and that article expressly declares "that until all the outstanding liabilities "and obligations of the Company absolute or contingent to policy "holders or creditors in the United States are fully paid and dis-"charged the said trust fund or so much thereof as may be neces-"sary to cover the outstanding liabilities shall remain in the pos-"session of the said trustees for security and protection of the said "policy holders and creditors."

The question how much may be necessary to cover the outstanding liabilities absolute or contingent must of course be determined by reference to the statute, which as we have seen requires that a capital fund shall remain in the possession of the trustees to cover such liabilities.

You advise me that the assets in the hands of the trustees are largely exceeded by losses amounting to about $420,000, and unexpired risks of the Company amounting to about $8,800,000.

I think it is plain that under the terms of the trust deed and the statutes of Connecticut you would not be at liberty under these circumstances to deliver to the Company any portion of the
71 assets in your hands as trustees.

The demand by the Alien Property Custodian that you deliver part of these assets to him necessarily rests upon and is limited by the Munich Re-insurance Company's right to demand such delivery. He is authorized by law to take possession of the property of the Munich Re-insurance Company as an Alien Enemy. He is not authorized to take possession of the property of American

policy holders and creditors, or of property held in trust for them by American trustees, and this is plainly the view of the Custodian, for he bases his demand upon the assertion that the value of securities in the hands of the trustees "exceeds the amount presently "required by the terms and conditions of such deed of trust, or by "the statutes, &c., having been released from the needs of business "in the course of liquidation."

As to that I advise you that if you deliver up any portion of the assets now in your hands as trustee on the ground stated by the Enemy Alien Custodian that the value exceeds the amount required by the terms and conditions of the deed of trust and the statutes you will do so at your own risk, and neither the recital of the Alien Property Custodian in his demand nor his demand itself will afford you any protection against liability to policy holders and creditors of the Munich Re-insurance Company in case the assets remaining in your hands should be insufficinet to meet all liabilities. The demand of the custodian recites a license issued to the Munich Re-inurance Company under the "Trading with the Enemy Act," and refers to an excess value of securities as

"having been released from the needs of business in the
72 course of liquidation, as provided by said license."

The license referred to was issued by the Acting Secretary of the Treasury May 8, 1918, and it authorizes the Munich Re-insurance Company to continue its business in liquidation. It contains the following condition imposed upon the Company "that "it (the Company) will at any time upon the order of the Alien "Property Custodian deliver to him or to a depositary designated "by him all or such portion of the securities owned by it, and all "its other assets or property in the United States as he shall de- "mand." It is to this provision apparently that the demand refers.

This provision, however, cannot affect your duties as trustees, or enlarge the rights of the Alien Property Custodian. It is a matter between the Treasury Department and the Company. You hold for your cestuis que trustent against the Company, and no condition imposed upon the Company or agreed to by it can bind you in any way.

You are not, however, left to determine unaided the question raised by the assertion of the Alien Property Custodian that you have an excess of assets in your hands. You are administering your trust under the laws of Connecticut, and the regulation of the Insurance Commissioner of that State dated April 25, 1917, contain- the following provision—"The United States Trustees shall "not disburse any funds or make any investments, or sell or "remove or transfer any securities without previous notice in writ- "ing to the Insurance Commissioner as aforesaid at the above ad- "dress. Such funds and securities shall be subject to the joint

"control of said Commissioner, or someone whom he may
73 "designate in writing, and the parties who but for these rules
"and regulations would be entrusted with their custody."

It is accordingly your duty to consult the Insurance Commissioner regarding the answer which you should make to the demand of

the Alien Property Custodian. The Commissioner is authorized by the laws of the State to enquire into the financial condition and management of the Company, and to examine its trustees and agents, its assets, books and accounts. The duty of joint control which the Commissioner has assumed to exercise under the regulation quoted would naturally and properly lead him to exercise this power of enquiry and examination for the purpose of determining to what extent (if any) his assent should be given to a present delivery of assets hitherto held by the trustees to the Alien Property Custodian.

I recommend that you transmit to the Insurance Commissioner of Connecticut a copy of the Alien Property Custodian's demand upon you, and request such an examination.

I enclose a draft of the communication to the Insurance Commissioner for that purpose.

Very truly yours,

ELIHU ROOT.

74 EXHIBIT 7.

December 19, 1918.

To The Insurance Commissioner of the State of Connecticut.

SIR:

The undersigned are the Trustees in the United States appointed by the Directors of the Munich Re-insurance Company under the provision of sections 3521 and 3522, chapter 206 of the General Laws of Connecticut, relating to foreign insurance companies.

That Company has been for some time in process of liquidation under the "Trading with the Enemy Act," and under a license issued by yourself April 1st 1918 and a license issued by the Treasury Department of the United States May 8th, 1918, and recently revoked.

The Alien Property Custodian under the "Trading with the Enemy Act" has made a demand upon us as such trustees for transfer and delivery to him of securities and property held by us in trust for the benefit of all the policy holders and creditors in the United States of the Munich Re-insurance Company, which the Custodian deems to be in excess of the amount required for the purposes of the trust. We are desirous to comply with the demand of the Alien Property Custodian if and so far as it may be consistent with our duties as trustees. We do not, however, feel at liberty to act or to decline to act on this demand independently both because of the statutory powers of regulation and supervision vested in you and because of the clause in your regulations
75 of April 25, 1917, which provides:

"The United States trustees shall not disburse any funds "or make any investment, or sell, remove, or transfer any securities, "without prevous notice in writing to the Insurance Commissioner "* * * Such funds and securities shall be subject to the joint "control of said Commissioner or someone whom he may designate

"in writing, and the parties who but for these rules and regulations "would be entrusted with their custody."

We accordingly transmit to you herewith a copy of the demand made upon us by the Alien Property Custodian dated October 28, 1918 for such action as you may deem appropriate.

We beg leave to suggest that unless in your opinion the duty imposed upon us as trustees by the statute requires us to retain in our possession all the invested assets of the Munich Re-insurance Company in our hands until the conclusion of the trust an examination of the affairs of the Company and of the trust in the exercise *if* your statutory powers with a view to determine whether there be any excess over the amount which the statute requires us to retain would contribute very much to the proper and satisfactory execution of the trust.

Very respectfully,

WALTER ROSEN,
RUDOLF METZ,
J. MARKHAM MARSHALL.

76 EXHIBIT 8.

Trust No. 1-996.
Report No. 12682.

Alien Property Custodian.

Demand for Property.

To Walter T. Rosen,
Rudolph Metz,
J. Markham Marshall, as Trustees, and to all Persons Whom This May Concern:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto and the Proclamations and Executive Orders issued pursuant thereto, after investigation, have determined heretofore and do hereby determine that the following property to wit:

All of that property particularly described, itemized and listed upon and by schedule attached hereto marked Exhibit A, each page of which is identified by the signature Thos. Phillips on the margin thereof;

Belongs to and is held for, by, on account of, on behalf of or for the benefit of the Munich Reinsurance Company which Company (whose principal Home Office and address is Munich, Germany) I, as such Alien Property Custodian, after investigation have determined heretofore and *to* determine hereby to be an enemy not holding a license granted by the President within the pur-

77 view of said Act, Proclamations and Executive Orders.

As such Alien Property Custodian I do seize such property and de-

quire of you jointly and of each of you severally that the said property shall be transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me held, administered and accounted for as provided by Law.

You are further authorized and directed to make the delivery and payment of such property to the New York Trust Company of New York City (or to its order) as Liquidator and Depositary for me under and by virtue of power of authority heretofore granted to said New York Trust Company.

This demand is supplementary to that certain demand with respect to the above described property heretofore issued by me on the 18th day of November, 1918.

Witness my hand and seal of office, this 12th day of February, 1919.

A. MITCHELL PALMER,
Alien Property Custodian.

T. S. PLACE.
[SEAL.]

Referred for Signature.
Division of Insurance.

THOS. H. PHILLIPS,
For Chief.

Approved:

Bureau of Law.
SPIER WHITAKER.

78 Service of the within Demand Accepted:

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Served the within Demand on each of the above named par
upon whom said Demand is made, by giving a true and correct co
thereof to such party and by making known to him the conte
thereof.

Witness my hand this — day of November, 1918.

A. P. C.—M. M.—6.19.

(Here follows list of stocks, bonds, etc., marked pages 79 and 8

Exhibit A—Page 1.

A) NATIONAL PARK BANK, NEW YORK

Bonds	Interest	Date	Maturity	Amount	
Atlanta & Charlotte Air Line Ry. First Mortgage	4½%	Jan.-July	1944	$50,000	
Atlantic Coast Line R. R. Louisville & Nashville Coll.	4 %	May-Nov.	1952	$25,000	
Atlantic & Danville R. R. First Mortgage	4 %	Jan.-July	1948	$30,000	
Baltimore & Ohio R. R. Equipment Series "H"	4½%	Apr.-Oct.	1921	$10,000	
Baltimore & Ohio R. R. Equipment Series "I"	4½%	Apr.-Oct.	1922	$10,000	
Baltimore & Ohio R. R. Equipment Series "J"	4½%	Apr.-Oct.	1923	$10,000	
Baltimore & Ohio R. R. Refunding Mortgage	5 %	June-Dec.	1995	$25,000	
Birmingham Ry. Light & Power Co. General Refunding	4½%	Apr.-Oct.	1954	$11,000	
Broadway & Seventh Ave. R. R. First Mortgage	5 %	June-Dec.	1943	$5,000	
Brooklyn Union Elevated R. R. 4½% First Mortgage	5 %	Feb.-Aug.	1950	$50,000	
Central Railroad of New Jersey, General Mortgage	5 %	Jan.-July	1987	$5,000	
Central Pacific Ry. First Refunding Mortgage	4 %	Feb.-Aug.	1949	$125,000	
Chesapeake & Ohio Ry. & A. Division I. Cons. Mtge.	4 %	Jan.-July	1989	$5,000	$100 in coupons not cashed
Chesapeake & Ohio Ry. General Mortgage	4½%	Mar.-Sept.	1992	$75,000	
Chesapeake & Ohio Ry. Convertible	4½%	Feb.-Aug.	1930	$25,000	
Chicago & Alton R. R. Refunding Mortgage	3 %	Apr.-Oct.	1949	$50,000	
Chicago & Northwestern Ry. General Mortgage	5 %	May-Nov.	1987	$8,000	
Chicago & Western Indiana R. R. Cons. Mortgage	4 %	Jan.-July	1952	$50,000	
Chicago, Lake Shore & Eastern Ry. First Mortgage	4½%	June-Dec.	1969	$25,000	
Chicago, Milwaukee & Puget Sound Ry. First Mortgage	4 %	Jan.-July	1949	$100,000	
Chicago, Milwaukee & St. Paul Ry. General Mortgage	4½%	Jan.-July	1989	$100,000	
Chicago, Rock Island & Pacific Ry. Refunding	4 %	Apr.-Oct.	1934	$50,000	
Chicago Union Station Company First Mortgage	4½%	Jan.-July	1963	$50,000	
Cincinnati, Indianapolis, St. Louis & Chicago R. R.	4 %	F.M.A.N.	1936	$10,000	
Cleveland, Cincinnati, Chicago & St. Louis R. R. Genl. Mtge.	4 %	June-Dec.	1993	$19,000	
Colorado & Southern Ry. Refunding & Ext.	4½%	May-Nov.	1935	$50,000	
Consolidated Gas Co. of New York, Convertible	6 %	F.M.A.N.	1920	$100,000	
Delaware & Hudson Co. First & Refunding Mortgage	4 %	May-Nov.	1943	$100,000	
Detroit & Mackinac R. R. First Lien	4 %	June-Dec.	1995	$100,000	
Detroit Terminal & Tunnel First Mortgage	4½%	May-Nov.	1961	$50,000	
Erie Railroad Co. General Lien	4 %	Jan.-July	1996	$50,000	
Erie Railroad Company Prior Lien	4 %	Jan.-July	1998	$25,000	
Erie Railroad Pennsylvania Collateral Trust	4 %	Feb.-Aug.	1951	$50,000	
Florida West Shore Ry. First Mortgage	5 %	Jan.-July	1934	$25,000	
German Imperial Government Treasury Bonds	5 %	Mar.-Sept.	1918	$200,000	$10,000 in coupons not —cashed. Deposited with Ladenburg Thalmann Co.
Hocking Valley Railway First Cons. Mortgage	4½%	Jan.-July	1999	$31,000	
Illinois Central R. R. St. Louis Division	3½%	Jan.-July	1951	$25,000	
Interborough Rapid Transit Co. First & Refdg. Mtge.	5 %	Jan.-July	1966	$50,000	
Kanawha & Michigan Ry. First Mortgage	4 %	Apr.-Oct.	1990	$10,000	
Kansas City, Fort Scott & Memphis Ry. Refunding	4 %	Apr.-Oct.	1936	$78,000	
Kansas City Southern Ry. First Mortgage	3 %	Apr.-Oct.	1950	$161,000	
Kansas City Southern Ry. Refunding & Impt.	5 %	Jan.-July	1950	$100,000	
Lake Erie & Western R. R. First Mortgage	5 %	Jan.-July	1937	$4,000	
Louisville & Nashville R. R. St. Louis Div., Second Mtge.	3 %	Mar.-Sept.	1980	$16,000	
Macon, Dublin & Savannah R. R. First Mortgage	5 %	Jan.-July	1947	$20,000	
Manhattan Ry. Consolidated Mortgage	4 %	Apr.-Oct.	1990	$25,000	
Minneapolis, St. Paul, Sault Ste Marie Ry.	4 %	Jan.-July	1938	$55,000	
New York, Chicago & St. Louis R. R. Debentures	4 %	May-Nov.	1931	$25,000	
New York, New Haven & Hartford R. R. Conv. Debentures	6 %	Jan.-July	1948	$7,000	
New York, New Haven & Hartford R. R. Conv. Debentures	3½%	Jan.-July	1956	$90,000	—$1375 in coupons not cashed.
New York, Ontario & Western Ry. General Mortgage	4 %	June-Dec.	1955	$100,000	
Northern Pacific R. R. Prior Lien	4 %	J.A.J.O.	1997	$25,000	
Northern Pacific R. R. St. Paul, Duluth Division	4 %	June-Dec.	1996	$50,000	
Oregon-Washington R. R. & Nav. Co. I. & Refdg. Mtge.	4 %	Jan.-July	1961	$100,000	
Philadelphia Company Convertible Debentures	5 %	May-Nov.	1922	$50,000	
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Cons. Mtge.	4½%	Feb.-Aug.	1963	$50,000	
Reading Company General Mortgage	4 %	Jan.-July	1997	$50,000	
Rio Grande Western R. R. First Mortgage	4 %	Jan.-July	1939	$20,000	
San Antonio & Arkansas Pass First Mortgage	4 %	Jan.-July	1943	$50,000	
Seaboard Air Line Ry. Atlanta Birmingham Division	4 %	Mar.-Sept.	1933	$50,000	
Seaboard Air Line Ry. Refunding Mortgage	4 %	Apr.-Oct.	1959	$100,000	
Seaboard Air Line Ry. 1st Consolidated Mortgage	6 %	Mar.-Sept.	1945	$50,000	
Southern Pacific R. R. Central Pacific Collateral	4 %	June-Dec.	1949	$25,000	
Southern Ry. St. Louis Division First Mortgage	4 %	Jan.-July	1951	$25,000	
St. Louis & San Francisco Ry. Prior Lien Mortgage	4 %	Jan.-July	1950	$112,500	
St. Louis & San Francisco Railway Adjustment Mortgage	6 %	Apr.-Oct.	1955	$37,500	
St. Louis Southwestern R. R. First Mortgage	4 %	May-Nov.	1989	$50,000	
Toledo & Ohio Central Ry. First Mortgage	5 %	Jan.-July	1935	$12,000	
Toledo & Ohio Central Ry. First Mortgage Western Div.	5 %	Apr.-Oct.	1935	$15,000	
Union Pacific R. R. First Lien & Refunding	4 %	Mar.-Sept.	2008	$50,000	
Wabash Railroad Omaha Division First Mortgage	3½%	Apr.-Oct.	1941	$50,000	
Western Maryland R. R. First Mortgage	4 %	Apr.-Oct.	1952	$75,000	
Western New York & Pennsylvania R. R. General 4%	4 %	Apr.-Oct.	1943	$20,000	
Wheeling & Lake Erie R. R. First Consolidated	4 %	Mar.-Sept.	1949	$25,000	
Wisconsin Central Ry. First General Mortgage	4 %	Jan.-July	1949	$74,000	
Stocks					
Atchison, Topeka & Santa Fe R. R. Preferred	5 %	Feb.-Aug.		$25,000	
Consolidated Gas Company of New York	7 %	M.J.S.D.		$25,000	
Norfolk & Western Railroad Preferred	4 %	F.M.A.N.		$20,000	
Pennsylvania Railroad	6 %	J.A.J.O.		$75,000	

B) LADENBURG, THALMANN & CO., NEW YORK

Bonds					
Atlantic Coast Line R. R. I. Cons. Mtge.	4 %	Mar.-Sept.	1952	$75,000	
Baltimore & Ohio R. R. Convertible	4½%	Mar.-Sept.	1933	$14,000	
Chicago, Burlington & Quincy R. R. General Mortgage	4 %	Mar.-Sept.	1958	$25,000	
German Imperial Government Treasury Notes	5 %	Mar.-Sept.	1918	$125,000	
United States Government Registered Gold	4 %	F.M.A.N.	1925	$50,000	
				$4,000,000	

Deposit account with Ladenburg, Thalmann & Co., New York, of $76,753.27 with all additions thereto and accrued interest at the rate of 3½%.

81 EXHIBIT 9.

Trust—I—996.

Alien Property Custodian.

Demand for Property.

To National Park Bank, New York City, N. Y., and to all persons whom this may concern:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto and the Proclamations and Executive Orders issued pursuant thereto, after investigation, have determined heretofore and do hereby determine that the following property to wit:

All of that property particularly described, itemized and listed upon and by schedule attached hereto marked Exhibit A, each page of which is identified by the signature Thos. H. Phillips on the Margin thereof.

Belongs to and is held by, on account of, on behalf of, or for the benefit of the Munich Reinsurance Company which company (whose principal Home Office and address is Munich, Germany) I, as such Alien Property Custodian, after investigation, have determined heretofore and do determine hereby to be an enemy not holding a license granted by the President within the Purview of said Act, Proclamation and Executive Orders.

82 As such Alien Property Custodian I do seize such property and do require of you jointly and of each of you severally that the said property shall be transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me held, administered and accounted for as provided by law.

You are further authorized and directed to make the delivery and payment of such property to Ralph J. Baker and or Alexander Kenny and/or James Schneider.

Witness my hand and seal of office this seventh day of March, 1919.

(Sgd.) FRANCIS P. GARVAN,
Alien Property Custodian.

Approved:
Bureau of Law.
(Sgd.) T. B. GOERTNER.

3/6/19.
Referred for signature.
Division of Insurance.
(Sgd.) THOS. H. PHILLIPS,
Acting Chief.

STATE OF NEW YORK,
County of New York, ss:

On this seventh day of March, 1919, before me personally come Francis P. Garvan, Alien Property Custodian, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same as Alien Property Custodian.

(Sgd.) E. H. McCULLOCH,
[NOTARY'S SEAL.] *Notary Public No. 92, New York.*
County Register's No. 10055.

Commission Expires March 30, 1920.

83 Service of the within Demand Accepted:
E. V. CONNOLLY.

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Served the within Demand on each of the above named parties upon whom said Demand is made, by giving a true and correct copy thereof to such party and by making known to him the contents thereof.

Witness my hand this 7th day of March, 1919.

A. P. C.—M. M.—6.T9.

The foregoing described property having been deposited with you by Dudolf Metz, J. Markham Marshall and Walter T. Rosen, as trustees under a certain trust deed made and executed by the Munich Reinsurance Company of Munich, Germany, on March 1, 1911.

(Here follows list of stocks, bonds, etc., marked pages 84-86.)

Exhibit A—Page 1.

Toledo & Ohio Central Ry. First Mortgage

Exhibit A—Page 1.

A) NATIONAL PARK BANK, NEW YORK

Bonds	Interest	Date	Maturity	Amount	
Atlanta & Charlotte Air Line Ry. First Mortgage	4½%	Jan.-July	1944	$50,000.	
Atlantic Coast Line R. R. Louisville & Nashville Coll.	4 %	May-Nov.	1952	$25,000.	
Atlantic & Danville R. R. First Mortgage	4 %	Jan.-July	1948	$30,000.	
Baltimore & Ohio R. R. Equipment Series "H"	4½%	Apr.-Oct.	1921	$10,000.	
Baltimore & Ohio R. R. Equipment Series "I"	4½%	Apr.-Oct.	1922	$10,000.	
Baltimore & Ohio R. R. Equipment Series "J"	4½%	Apr.-Oct.	1923	$10,000.	
Baltimore & Ohio R. R. Refunding Mortgage	5 %	June-Dec.	1995	$25,000.	
Birmingham Ry. Light & Power Co. General Refunding	4½%	Apr.-Oct.	1954	$11,000.	
Broadway & Seventh Ave. R. R. First Mortgage	5 %	June-Dec.	1943	$5,000.	
Brooklyn Union Elevated R. R. 5% First Mortgage	5 %	Feb.-Aug.	1950	$50,000.	
Central Railroad of New Jersey, General Mortgage	5 %	Jan.-July	1987	$5,000.	
Central Pacific Ry. First Refunding Mortgage	4 %	Feb.-Aug.	1949	$125,000.	
Chesapeake & Ohio Ry. & A. Division I. Cons. Mtge.	4 %	Jan.-July	1989	$5,000.	$100 in coupons not cashed
Chesapeake & Ohio Ry. General Mortgage	4½%	Mar.-Sept.	1992	$75,000.	
Chesapeake & Ohio Ry. Convertible	4½%	Feb.-Aug.	1930	$25,000.	
Chicago & Alton R. R. Refunding Mortgage	3 %	Apr.-Oct.	1949	$50,000.	
Chicago & Northwestern Ry. General Mortgage	5 %	May-Nov.	1987	$8,000.	
Chicago & Western Indiana R. R. Cons. Mortgage	4 %	Jan.-July	1952	$50,000.	
Chicago, Lake Shore & Eastern Ry. First Mortgage	4½%	June-Dec.	1969	$25,000.	
Chicago, Milwaukee & Puget Sound Ry. First Mortgage	4 %	Jan.-July	1949	$100,000.	
Chicago, Milwaukee & St. Paul Ry. General Mortgage	4½%	Jan.-July	1989	$100,000.	
Chicago, Rock Island & Pacific Ry. Refunding	4 %	Apr.-Oct.	1934	$50,000.	
Chicago Union Station Company First Mortgage	4½%	Jan.-July	1963	$50,000.	
Cincinnati, Indianapolis, St. Louis & Chicago R. R.	4 %	F.M.A.N.	1936	$10,000.	
Cleveland, Cincinnati, Chicago & St. Louis R. R. Genl. Mtge.	4 %	June-Dec.	1993	$39,000.	
Colorado & Southern Ry. Refunding & Ext.	4½%	May-Nov.	1935	$50,000.	
Consolidated Gas Co. of New York, Convertible	6 %	F.M.A.N.	1920	$100,000.	
Delaware & Hudson Co. First & Refunding Mortgage	4 %	May-Nov.	1943	$100,000.	
Detroit & Mackinac R. R. First Lien	4 %	June-Dec.	1995	$100,000.	
Detroit Terminal & Tunnel First Mortgage	4½%	May-Nov.	1961	$50,000.	
Erie Railroad Co. General Lien	4 %	Jan.-July	1996	$50,000.	
Erie Railroad Company Prior Lien	4 %	Jan.-July	1996	$25,000.	
Erie Railroad Pennsylvania Collateral Trust	4 %	Feb.-Aug.	1951	$50,000.	
Florida West Shore Ry. First Mortgage	5 %	Jan.-July	1934	$25,000.	
German Imperial Government Treasury Bonds	5 %	Mar.-Sept.	1918	$200,000.	$10,000 in coupons not —cashed. Deposited with Ladenburg Thalmann Co.
Hocking Valley Railway First Cons. Mortgage	4½%	Jan.-July	1999	$31,000.	
Illinois Central R. R. St. Louis Division	3½%	Jan.-July	1951	$25,000.	
Interborough Rapid Transit Co. First & Refdg. Mtge.	5 %	Jan.-July	1966	$50,000.	
Kanawha & Michigan Ry. First Mortgage	4 %	Apr.-Oct.	1990	$10,000.	
Kansas City, Fort Scott & Memphis Ry. Refunding	4 %	Apr.-Oct.	1936	$78,000.	
Kansas City Southern Ry. First Mortgage	3 %	Apr.-Oct.	1950	$164,000.	
Kansas City Southern Ry. Refunding & Impt.	5 %	Jan.-July	1950	$100,000.	
Lake Erie & Western R. R. First Mortgage	5 %	Jan.-July	1937	$4,000.	
Louisville & Nashville R. R. St. Louis Div., Second Mtge	3 %	Mar.-Sept.	1980	$16,000.	
Macon, Dublin & Savannah R. R. First Mortgage	5 %	Jan.-July	1947	$20,000.	
Manhattan Ry. Consolidated Mortgage	4 %	Apr.-Oct.	1990	$25,000.	
Minneapolis, St. Paul, Sault Ste. Marie Ry.	4 %	Jan.-July	1938	$55,000.	
New York, Chicago & St. Louis R. R. Debentures	4 %	May-Nov.	1931	$25,000.	
New York, New Haven & Hartford R. R. Conv. Debentures	6 %	Jan.-July	1948	$7,000.	
New York, New Haven & Hartford R. R. Conv. Debentures	3½%	Jan.-July	1956	$90,000.	—$1575 in coupons *not cashed.*
New York, Ontario & Western Ry. General Mortgage	4 %	June-Dec.	1955	$100,000.	
Northern Pacific R. R. Prior Lien	4 %	J.A.J.O.	1997	$25,000.	
Northern Pacific R. R. St. Paul, Duluth Division	4 %	June-Dec.	1996	$50,000.	
Oregon-Washington R. R. & Nav. Co. I. & Refdg. Mtge.	4 %	Jan.-July	1961	$100,000.	
Philadelphia Company Convertible Debentures	5 %	May-Nov.	1922	$50,000.	
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Cons. Mtge.	4½%	Feb.-Aug.	1963	$50,000.	
Reading Company General Mortgage	4 %	Jan.-July	1997	$50,000.	
Rio Grande Western R. R. First Mortgage	4 %	Jan.-July	1939	$20,000.	
San Antonio & Arkansas Pass First Mortgage	4 %	Jan.-July	1943	$50,000.	
Seaboard Air Line Ry. Atlanta Birmingham Division	4 %	Mar.-Sept.	1933	$50,000.	
Seaboard Air Line Ry. Refunding Mortgage	4 %	Apr.-Oct.	1959	$100,000.	
Seaboard Air Line Ry. 1st Consolidated Mortgage	6 %	Mar.-Sept.	1945	$50,000.	
Southern Pacific R. R. Central Pacific Collateral	4 %	June-Dec.	1949	$25,000.	
Southern Ry. St. Louis Division First Mortgage	4 %	Jan.-July	1951	$25,000.	
St. Louis & San Francisco Ry. Prior Lien Mortgage	4 %	Jan.-July	1950	$112,500.	
St. Louis & San Francisco Railway Adjustment Mortgage	6 %	Apr.-Oct.	1955	$37,500.	
St. Louis Southwestern R. R. First Mortgage	4 %	May-Nov.	1989	$50,000.	
Toledo & Ohio Central Ry. First Mortgage	5 %	Jan.-July	1935	$12,000.	
Toledo & Ohio Central Ry. First Mortgage Western Div.	5 %	Apr.-Oct.	1935	$15,000.	
Union Pacific R. R. First Lien & Refunding	4 %	Mar.-Sept.	2008	$50,000.	
Wabash Railroad Omaha Division First Mortgage	3½%	Apr.-Oct.	1941	$50,000.	
Western Maryland R. R. First Mortgage	4 %	Apr.-Oct.	1952	$75,000.	
Western New York & Pennsylvania R. R. General 4%	4 %	Apr.-Oct.	1943	$20,000.	
Wheeling & Lake Erie R. R. First Consolidated	4 %	Mar.-Sept.	1949	$25,000.	
Wisconsin Central Ry. First General Mortgage	4 %	Jan.-July	1949	$74,000.	
Stocks					
Atchison, Topeka & Santa Fe R. R. Preferred	5 %	Feb.-Aug.		$25,000.	
Consolidated Gas Company of New York	7 %	M. J. S. D.		$25,000.	
Norfolk & Western Railroad Preferred	4 %	F. M. A. N.		$20,000.	
Pennsylvania Railroad	6 %	J. A. J. O.		$75,000.	

B) LADENBURG, THALMANN & CO., NEW YORK

Bonds					
Atlantic Coast Line R. R. I. Cons. Mtge.	4 %	Mar.-Sept.	1952	$75,000.	
Baltimore & Ohio R. R. Convertible	4½%	Mar.-Sept.	1933	$14,000.	
Chicago, Burlington & Quincy R. R. General Mortgage	4 %	Mar.-Sept.	1958	$25,000.	
German Imperial Government Treasury Notes	5 %	Mar.-Sept.	1918	$125,000.	
United States Government Registered Gold	4 %	F. M. A. N.	1925	$50,000.	
				$4,093,000.	

Deposit account with Ladenburg, Thalmann & Co., New York, of $76,753.27 with all additions thereto and accrued interest at the rate of 3½%.

87 EXHIBIT 10.

Supreme Court of the State of New York, New York County.

RUDOLF METZ and J. MARKHAM MARSHALL, as Trustees under a Certain Trust Deed Made and Executed by the Munich Re-Insurance Company of Munich, Germany, Plaintiffs,

against

MUNICH RE-INSURANCE COMPANY of MUNICH, GERMANY; A. Mitchell Palmer, as Alien Property Custodian, Acting under the Provisions of the Act of Congress Entitled "Trading with the Enemy Act"; Walter T. Rosen as Trustee under a Certain Trust Deed Made and Executed by the Munich Re-Insurance Company of Munich, Germany; Aetna Insurance Company; Agricultural Insurance Company; American Fire Insurance Company; Concordia Fire Insurance Company; Continental Fire Insurance Company; Firemen's Fire Insurance Company of Newark; National Liberty Insurance Company; Hanover Fire Insur-
88 ance Company; Hartford Fire Insurance Company; The Home Insurance Company; The Insurance Company of the State of Pennsylvania; Milwaukee Mechanics Insurance Company; Pacific Fire Insurance Company; Security Insurance Company of New Haven; Springfield Fire and Marine Insurance Company; Buffalo Insurance Company; Citizens Insurance Company of Missouri; Aetna Life Insurance Company; The Fidelity & Casualty Company of New York; National Surety Company; The Pacific Mutual Life Insurance Company of California; The Preferred Accident Insurance Company of New York; The Travellers Insurance Company; United States Casualty Company; United States Fidelity & Guarantee Company; Herbert Appleton and Douglass F. Cox as attorneys in fact of and representing James Crosby Brown; Howland Davis; James M. Edwards; M. Orme Wilson; Horace Havemeyer; Thomas H. Kelly James L. Laidlaw; John T. Terry; John E. Berwind; Adrian Iselin,
89 Jr., Ernest Iselin, Lewis Iselin and Columbus O'Donnell Iselin, Co-partners Doing Business under the Firm Name and Style of A. Iselin & Co.; Adrian Iselin, Jr., Individually; J. D. Barrett (first name unknown); H. H. Rogers (first name unknown); W. R. Peters (first name unknown); Frank A. Vanderlip; Howard P. Sweetser; P. A. S. Franklin (first name unknown); Arthur B. Claflin; Charles N. Lee; William Sloane; J. Ogden Armour; Joseph J. O'Donohue, Jr.; W. B. Thomas (first name unknown); J. Adolph Mollenhauer; O. M. Mitchell (first name unknown); George S. Dearborn; Flint & Co.; Edward C. Hoyt; Warren G. Horton; Lewis H. Lapham; Carleton H. Palmer; Stephen Loines; William E. Iselin; William P. Clyde; H. A. Berwind (first name unknown); Charles M. Smith; S. De Ridder (first name unknown); Edmund Trouton; Leaycraft & Co.; Adolph Norden; Louis Watjen and Stephen Edward Nash,

Co-partners Doing Business under the Firm Name and Style of Watjen, Toel & Co.; Robert K. Smith; Louis Watjen, Individually; Henry R. Mallory; Silas D. Webb; Orville T. Waring; H. St. John Webb; George H. Ware; Edward L. Tucker; Charles D. Lanier; J. Pierpont Morgan, Edward T. Stotsbury, Charles Steele, Henry P. Davidson, Arthur E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont, Horatio G. Lloyd, Dwight W. Morrow, Edward R. Stettinius and Thomas Cochran, Co-partners Doing Business under the Firm Name and Style of J. P. Morgan & Co.; Henry P. Davison, Individually; J. Pierpont Morgan, Individually; Lewis Iselin, Individually; Levi P. Morton; Walter P. Bliss, George R. Agnew, W. Redmond Cross; William B. Goodwin; Herman S. Crossman, Frederick W. White; James Brown; C. S. Mathews (first name unknown); Seth M. Milliken; Louis Muller; F. A. Meyer (first name unknown); Charles A. O'Donohue; Stephen W. Carey, Bernard McCloskey; James H. Post; James B. Dickson; Charles W. McCutcheon; Joseph M. Cudahy; Charles F. Torrey; John D. Ryan; Herbert Appleton; Alba B. Johnson; James Dobson; W. J. McCahan (first name unknown); Robert H. McCurdy; Samuel Sloane; Edward T. Bedford; Louis F. Swift; B. N. Baker (first name unknown); John E. Hurst; F. W. Wood (first name unknown); E. Levering & Co. (the names of the partners in said firm being unknown); Eugene Blackford; Alex J. Godby; William H. Dix; Charles C. Homer, Jr.; Joshua Levering; F. W. Wilson & Son (the names of the partners in said firm being unknown); Edwin F. Atkins; Blanchard Randall; R. Brent Keyser; Waldo Newcomer; Edward H. Sanford; Douglas H. Cox, Individually; S. T. Morgan (first name unknown); the defendants above mentioned with the added designations "first name unknown" and "the names of the partners in said firm being unknown," are so described as being defendants whose true names are unknown to the plaintiffs herein and who are persons or firms who as policyholders or creditors or otherwise have a claim, or either now or at some future time might have a might claim, to have any right against the plaintiffs herein as trustees, or any right or interest, legal or equitable, against in or in respect of the said trust funds or any part thereof now in possession or under control of the trustees; Blank Company, Doe & Roe, John Doe, Jane Doe, Richard Roe, Jane Roe, Richard Styles and Rebecca Styles unknown, the said names being fictitious, the persons, firms, associations and corporations thus designated being each and every person, firm, association and corporation which as policy holders or creditors or otherwise have or claim or either now or at some future time might have a might claim to have any right against the plaintiffs as trustees under said trust deed, or any right or interest, legal or equitable against, in or in respect of the said trust fund or any part thereof now in the possession or under the control of said trustees, Defendants.

Summons.

To the Above Named Defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attor-
93 neys within twenty days after service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York City, March 3, 1919.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Plaintiffs.

Office & P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

94 Supreme Court of the State of New York, New York County.

Rudolph Metz and J. Markham Marshall, as Trustees Under a Certain Trust Deed Made and Executed by the Munich Re-Insurance Company of Munich, Germany, Plaintiffs,

against

Munich Re-Insurance Company of Munich Germany; A. Mitchell Palmer as Alien Property Custodian, Acting Under the Provisions of the Act of Congress Entitled "Trading with the Enemy Act;" Walter T. Rosen, as Trustee under a certain trust deed made and executed by the Munich Re-Insurance Company of Munich, Germany; Aetna Insurance Company; Agricultural Insurance Company; American Fire Insurance Company; Concordia Fire Insurance Company; Continental Fire Insurance Company; Firemen's Fire Insurance Company of Newark; National Liberty Insurance Company; Hanover Fire Insurance Company; Hartford Fire Insurance Company; The
95 Home Insurance Company; The Insurance Company of the State of Pennsylvania; Milwaukee Mechanics Insurance Company; Pacific Fire Insurance Company; Security Insurance Company of New Haven, Springfield Fire and Marine Insurance Company; Buffalo Insurance Company; Citizens Insurance Company of Missouri; Aetna Life Insurance Company; The Fidelity & Casualty Company of New York; National Surety Company; The Pacific Mutual Life Insurance Company of California; The Preferred Accident Insurance Company of New York; The Travellers Insurance Company; United States Casualty Company; United States Fidelity & Guarantee Company; Herbert Appleton and Douglass F. Cox, as attorneys in fact of and representing James Crosby Brown; Howland Davis; James M. Edwards; M. Orme Wilson; Horace Havemeyer; Thomas H. Kelly; James L. Laidlaw; John T. Terry; John E. Berwind; Adrian Iselin, Jr., Ernest

Iselin, Lewis Iselin and Columbus O'Donnell Iselin, co-p
96 ners doing business under the firm name and style of
Iselin & Co.; Adrian Iselin, Jr., individually; J. D. Ba
(first name unknown); H. H. Rogers (first name unknow
W. R. Peters (first name unknown); Frank A. Vanderlip; H
ard P. Sweetster; P. A. S. Franklin (first name unknown); Art
B. Claflin; Charles N. Lee; William Sloane; J. Ogden Arm
Joseph J. O'Donohue, Jr.; W. B. Thomas (first name unknow
J. Adolph Mollenhauer; O. M. Mitchell (first name unknow
George S. Dearborn; Flint & Co.; Edward C. Hoyt; Warren
Horton; Lewis H. Lapham; Carleton H. Palmer; Stephen Lo
William E. Iselin; William P. Clyde; H. A. Berwind (first n
unknown); Charles M. Smith; S. De Ridder (first name
known); Edmund Trouton; Leaycraft & Co.; Adolph Nord
Louis Watjen and Stephen Edward Nash, co-partners doing b
ness under the firm name and style of Watjen, Toel &
Robert K. Smith; Louis Watjen, individually; Henry R. Mall
Silas D. Webb; Orville T. Waring; H. St. John W
97 George H. Ware; Edward L. Tucker; Charles D. La
J. Pierpont Morgan, Edward T. Stotesbury, Charles St
Henry P. Davidson, Arthur E. Newbold, William Pierson Ha
ton, William H. Porter, Thomas W. Lamont, Horatio G. L
Dwight W. Morrow, Edward R. Stettinius and Thomas Coch
co-partners doing business under the firm name and style of
Morgan & Co.; Henry P. Davison, individually; J. Pierpont
gan, individually; Lewis Iselin, individually; Levi P. Mo
Walter P. Bliss; George B. Agnew; W. Redmond Cross; Wil
B. Goodwin; Herman S. Crossman; Frederick W. White; Ja
Brown; C. S. Mathews (first name unknown); Seth M. Milli
Louis Muller; F. A. Meyer (first name unknown); Charle
O'Donohue; Stephen W. Carey; Bernard McCloskey; James
Post; James R. Dickson; Charles W. McCutcheon; Joseph
Cudahy; Charles F. Torrey; John D. Ryan; Herbert Appl
Alba B. Johnson; James Dobson; W. J. McCahan
98 name unknown); Robert H. McCurdy; Samuel Sl
Edward T. Bedford; Louis F. Swift; B. N. Baker
name unknown); John E. Hurst; F. W. Wood (first nam
known); E. Levering & Co. (the names of the partners in
firm being unknown); Eugene Blackford; Alex J. Godby;
liam H. Dix; Charles C. Homer, Jr.; Joshua Levering; F
Wilson & Son (the names of the partners in said firm
unknown); Edwin F. Atkins; Blanchard Randall; R.
Keyser; Waldo Newcomer; Edward H. Sanford; Dougla
Cox, individually; S. T. Morgan (first name unknown); th
fendants above mentioned with the added designations "first
unknown" and "the names of the partners in said firm
unknown," are so described as being defendants whose true n
are unknown to the plaintiffs herein and who are perso
firms who as policy holders or creditors or otherwise have or c
or either now or at some future time might have or might

to have any right against the plaintiffs herein as trustees,
99 or any right or interest, legal or equitable, against, in or
in respect of the said trust funds or any part thereof now
in possession or under control of the trustees; Blank Company, Doe & Roe, John Doe, Jane Doe, Richard Roe, Jane Roe, Richard Styles and Rebecca Styles unknown, the said names being fictitious, the persons, firms, associations and corporations thus designated being each and every person, firm, association and corporation which as policy holders or creditors or otherwise have or claim or either now or at some future time might have or might claim to have any right against the plaintiffs as trustees under said trust deed, or any right or interest, legal or equitable, against, in or in respect of the said trust fund or any part thereof now in the possession or under the control of said trustees, Defendants.

The above named plaintiffs by Root, Clark, Buckner & Howland, their attorneys, respectfully allege to this Court as follows:

100 First.

For a First Cause of Action.

1. On information and belief, that the defendant Munich Reinsurance Company was at all the times hereinafter mentioned and now is a corporation organized and existing under and by virtue of the laws of the Kingdom of Bavaria, Empire of Germany.

II. That by Chapter 265, Title Twenty-five of the General Statutes, Revision of 1902, of the State of Connecticut, approved June 21, 1901, and becoming effective on July 1, 1902, it was provided, among other things, as follows:

"Sec. 3580. Limitation of risks taken by company. No fire insurance company doing business in this state shall expose itself to loss on any one risk to an amount exceeding ten per cent. of its paid-up capital and surplus, but in determining the amount of said risk no portion thereof which shall have been reinsured in any corporation or corporations authorized to do insurance business in this state shall be included."

"Sec. 3769. Examination of affairs, and officers. The insurance commissioner, either personally or by a committee appointed by him, consisting of one or more persons not directors, officers, or agents of any fire or fire and marine insurance company doing business in this state, may at any time examine into the affairs of
101 any fire or fire and marine insurance company incorporated by or doing business in this state. The officers or agents of such company shall exhibit its books to said commissioner or committee, and otherwise facilitate such examination; the commissioner or committee may examine under oath the officers and agents of any such company in relation to its affairs. Said Com-

missioner may publish the result of such investigation in one or more newspapers published in this state. In relation to the affairs of any company incorporated by or organized under the laws of any other state of the United States, he may, in lieu of such investigation, accept the certificate of the insurance commissioner or superintendent of such state as to its condition. Whenever the commissioner shall ascertain that the assets of any fire or fire and marine insurance company incorporated by this state, after deducting for reinsurance and its other proper liabilities, excepting capital, amount to less than three-fourths of its capital stock, if it have a stock capital, or in the case of a mutual company, if the assets, less the unsettled claims and other absolute liabilities, amount to less than three-fourths the sum requisite for reinsurance he shall call upon it to make up such deficiency within such reasonable time as he shall fix, and on failure to comply with such requirement shall bring his petition to a judge of the superior court, praying for an injunction restraining said company from the further prosecution of the business of making or renewing insurance until said deficiency is made up; and if, upon a hearing before said judge, after such reasonable notice to such company as may be
102 ordered, the allegations contained in such petition shall be found to be true, such judge shall issue such injunction."

III. That by Chapter 206, Title 25 of the General Statutes, Revision of 1902 of the State of Connecticut, approved June 11, 1901, and becoming effective on July 1, 1902, it was provided, among other things, as follows:

"Sec. 3518. Term 'foreign insurance company' defined. The term 'foreign insurance company' shall include any company, corporation, association, partnership, or individual of any foreign country doing insurance business in this state."

"Sec. 3519. When foreign fire insurance company may transact business here. No foreign fire insurance company shall take risks in this state unless it has a cash capital of two hundred thousand dollars, and shall have made a deposit with the treasurer of this state or with the proper officer of some other state of not less than two hundred thousand dollars in securities authorized by law for investments by savings banks, in trust for the benefit of its policyholders in the United States; and no policy issued by such company to any citizen of this state shall be invalidated by the occurrence of hostilities between the government of the United States and the government under the laws of which it was organized."

"Sec. 3520. Information to be furnished commissioner. Every foreign insurance company shall, before admission to do busi-
103 ness in this state, furnish to the insurance commissioner a copy of its charter or articles of association, of its last annual report made in the country where it was organized, and the certificate of the officer holding in trust said deposit of two hundred thousand dollars, stating the manner in which the same is invested and the purposes for which the same is held; and it shall furnish annually

to the insurance commissioner a statement of the condition of its affairs in the United States, in such form as he shall require."

"Sec. 3521. Amount of capital how estimated. Capital of every such foreign insurance company shall, for the purposes of the insurance laws of this state, be the aggregate value of its money or securities deposited as aforesaid, and all sums loaned on real estate security in any state in the United States, in conformity with the laws of such state providing for the investment of the assets of insurance companies therein, and all other assets in the United States in which fire insurance companies organized under the laws of this state may invest; provided such real estate securities and assets shall be held in the United States by trustees who are citizens of the United States approved by the insurance commissioner, for the benefit of all its policy-holders and creditors in the United States, after making the same deduction from such aggregate value for losses and liabilities in the United States, and for premiums upon risks therein not expired, as is authorized or required by the laws of this state, or by the regulations of its insurance depart-
104 ment with respect to fire insurance companies organized under the laws of this state."

"Sec. 3522. Appointment of trustees. The trustees referred to in Sec. 3521 shall be appointed by the directors of such company, and a certified copy of the vote by which they are appointed and of the deed of trust shall be filed in the office of the insurance commissioner; and he may examine such trustees or the agents of such company, under oath, and its assets, books, and accounts, in the same manner as he may examine the officers, agents, assets, books, and accounts, of any company authorized to do fire insurance business in this state."

"Sec. 3523. Conditions precedent to transaction of business. No foreign insurance company, or agent or attorney thereof, shall transact the business of fire insurance in this state until such company shall have complied with the law of this state relative to foreign insurance companies, and received a license or certificate of authority from the insurance commissioner; nor shall such companies make contracts of insurance on property in this state except through lawfully constituted and licensed resident agents."

"Sec. 3524. Limitation of risks. No foreign insurance company shall insure against loss by fire or inland navigation, nor expose itself to any such loss by any one risk, for any greater amount in proportion to its capital than companies which are organized
105 under the laws of this state."

"Sec. 3525. License to transact business. When a foreign insurance company shall have complied with the provisions of law relating to such companies, and the insurance commissioner is satisfied that it is solvent in the United States, he may issue to it a license to transact business in this state, upon the payment of thirty dollars for filing a certified copy of its charter or deed of settlement,

and annual fees as follows: license fee, fifty dollars; fee for filing statement, twenty dollars; and two dollars for each agent's certificate of authority."

IV. That the aforesaid statutes were at all the times hereinafter mentioned, and now are, in full force and effect in the said state.

V. That for the purpose of establishing a suitable capital pursuant to the provisions of said Section 3521, and thus enabling it to insure substantial risks without violating the provisions of said Sections 3500 and 3524, the defendant Munich Re-Insurance Company on or about March 13, 1911, duly executed and delivered a certain trust deed wherein and whereby Ernst Thalmann, Isaac N. Seligman and Hermann Sielcken, all citizens of the United States and residents of the State of New York, were appointed trustees thereunder. A true copy of said trust deed and the whole thereof is as follows:

"This Indenture, made the thirteenth day of March in the year one thousand nine hundred and eleven, between the Munich
106 Re-Insurance Company of Munich, in the Kingdom of Bavaria, Germany, hereinafter called the 'Company,' party of the first part, and Mr. Ernest Thalmann, Mr. Isaac N. Seligman and Mr. Hermann Sielcken, of New York, all citizens of the United States, parties of the second part,

"Witnesseth:

"Whereas it was enacted in and by a certain Act or Acts of the Legislature of the State of Connecticut, entitled 'Laws relating to Insurance and Insurance Companies, General Statutes Chapter 206, especially relating to Foreign Insurance Companies' that under:

"'Sec. 3521. Amount of Capital, How Estimated. The capital of every such foreign insurance company shall, for all the purposes of the insurance laws of the state, be the aggregate value of its money or securities deposited as aforesaid, and all sums loaned on real estate security in any state in the United States, in conformity with the laws of such state providing for the investment of the assets of insurance companies therein and all other assets in the United States in which fire insurance companies organized under the laws of this state may invest; provided such real estate securities and assets shall be held in the United States by trustees who are citizens of the United States approved by the insurance commissioner for the benefit of all its policy holders and creditors in the United States
107 after making the same deduction from such aggregate value for losses and liabilities in the United States, and for premiums upon risks therein not expired as is authorized or required by the laws of this state, or by the regulations of its insurance department, with respect to fire insurance companies organized under the laws of this state.'

"and that under:

"'Sec. 3522. Appointment of trustees. The trustees referred to in Sec. 3521 shall be appointed by the directors of such company,

and a certified copy of the vote by which they are appointed and of the deed of trust shall be filed in the office of the insurance commissioner; and he may examine such trustees or the agents of such company, under oath, and its assets, books, and accounts in the manner as he may examine the officers, agents, assets, books and accounts, of any company authorized to do insurance business in this State.'

"And Whereas the said Company is a foreign Insurance Company, duly organized and existing under the laws of the Kingdom of Bavaria, Germany, and carrying on the business of re-insurance in the said State of Connecticut and elsewhere in the United States, by the Resident Manager in said City of Hartford; Now, therefore, to the end that the aforesaid statute of the State of Connecticut may be fully complied with:

"Know all men by these presents that the said Company doth hereby constitute and appoint Mr. Ernest Thalmann, Mr.
108 Isaac N. Seligman, and Mr. Herman Sieleken of New York, the parties of the second part, and their successors appointed in the manner hereinafter provided, Trustees for the purposes hereinafter stated, and upon the trusts, covenants, agreement, and provisions hereinafter declared and set forth.

"First. The said Trustee shall receive, hold, possess and safely keep all assets and property of every kind and description which shall from time to time hereafter be delivered to them by the Company, the same to be held, used and appropriated to and for satisfying the purposes in the act of the Legislature above mentioned, to be held in trust for the Company.

"Second. The Trustees shall give proper receipts and vouchers to the Company for all the property so from time to time delivered to them by the Company, and the said Trustees shall keep a full and accurate record, inventory, and account of the said property so received, and of all their transactions in relation to the same, which record, inventory, and account, shall at all times be opened to the inspection of the Company, its duly authorized agent or agents; and the said Trustees shall from time to time, as they may be required, render and deliver to the Company in such form as its Board of Directors may from time to time prescribe, a true, full and just account of the business of the said trust, and of all the property held under the same.

109 "Third. The Trustees shall have power (with the previous consent of the Company), to invest and re-invest from time to time the property so as aforesaid delivered in trust, and to this end they shall have power (with such consent as aforesaid) to make all necessary sales, conveyances, assignments, and transfers, and no purchaser shall be obliged to see to the application of the purchase money. It shall be the duty of the Trustees from time to time to make such investments, purchases, sales, conveyances and assignments as they may be requested to make by the said Company.

The current interest and income of the said trust property, as it accrues and is received by the Trustees, shall be paid by them to the Company through its bankers in the City of Hartford.

"Fourth. If at any times debts and liabilities for the security of which this trust is created, shall accrue and become due and payable by the Company, and shall not be otherwise satisfied and paid, the Trustee shall have power to appropriate so much of the said trust property as may be necessary to the payment and satisfaction thereof, but no alleged debt or liability shall be so paid or satisfied unless and until the amount and validity of the said alleged debt or liability in each case shall have been admitted by the Company, or until the validity and amount thereof have been established by the claimant in due course of law.

"Fifth. The Trustees shall permit the Company from time to time, if and as occasion shall require, to withdraw such pro-
110 portion of the said trust property as the Company may require for the purpose of making a deposit in any other State or States as a basis for carrying on the business of insurance in such State or States, in compliance with the law thereof, and shall deliver to the Company so much of the trust property as may be required for such purpose.

"Sixth. All vacancies occurring in the trust hereby created, from any cause whatever, shall and may be filled by the appointment by the Company of a successor or successors to the said trust, and the Trustee so appointed, upon accepting such appointment, without further act or deed shall have and possess all the estate, rights and powers conferred upon the said Trustees respectively named in this instrument, in and by the provisions thereof, and shall be subject to all the duties imposed upon such Trustees respectively.

"Seventh. The said Trustees, parties of the second part, and their successors, may at any time resign, and the vacancy created by every such resignation shall and may be filled by the Company, and the said Company shall have the power at any time, and from time to time, without assigning any cause therefor, to remove any one or more of the said Trustees or their successors, by notice of such removal in writing and thereupon the said Company shall and may, at any time or times thereafter, appoint a successor or
111 successors to the said Trustee or Trustees so removed.

"Eighth. The said Trustees and their successors shall be liable respectively only for their own neglect and misfeasance, and not for the neglect or misfeasance of each other.

"Ninth. After making due provision for the purposes aforesaid and subject to the provisions hereinbefore contained, the Trustees shall stand possessed of the said trust fund, at the control and subject to the order of the Company, and shall and will use and dispose of the same as the Company may direct or appoint. But it is hereby expressly declared and provided, that until all the out-

standing liabilities and obligations of the Company, absolute or contingent, to policy-holders or creditors in the United States, are fully paid and discharged, the said trust fund, or so much thereof as may be necessary to cover the outstanding liabilities shall remain in the possession of the said Trustees, for the security and protection of the said policy-holders and creditors, anything herein contained to the contrary notwithstanding.

"Tenth. The Company reserves to itself the right hereafter to add to, alter, modify, or revoke the trusts, conditions, and powers hereby declared, imposed, or conferred in such manner as its Board of Directors may by resolution determine, and as shall be according to law, provided that the rights of its policy-holders and creditors in the United States shall not be thereby impaired.

112 "In Witness Whereof, the Company have hereunto affixed their common seal, and the said parties hereto of the second part, have hereunto set their hands and seals the day and year first above written.

"On behalf of the

MUNICH RE-INSURANCE COMPANY.
CARL THIEME,
President.
PAUL SZELINSKI,
Secretary.

"UNITED STATES CONSULATE GENERAL,
Munich, Bavaria, ss:

"On this 13th day of March, 1911, before me personally came Mr. Carl Thieme, President, and Mr. Paul Szelinski, Secretary of the Munich Re-Insurance Company, with whom I am personally acquainted, who being by me duly sworn said that they resided in the City of Munich; that Mr. Thieme was president and Mr. Szelinski was Secretary of the Munich Re-Insurance Company, that they knew the corporate seal of said Munich Re-Insurance Company, that the seal affixed to the annexed conveyance was such corporate seal, that it was affixed by order of the Board of Directors of said Munich Re-Insurance Company and that they signed their names thereto by like order as President and Secretary of said Munich Re-Insurance Company.

113 "Witness my hand and the seal of this Consulate General the day and year first above written.

ABRAHAM SCHLESINGER,
[L. S.] *Vice & Deputy Consul General of the United States of America at Munich, Bavaria.*"

No. 241.
Fee M 8.50.
$2.00.

VI. That pursuant to the terms of said trust deed the said Munich Re-Insurance Company assigned, transferred and conveyed to

the trustees therein named certain of its moneys, securities, assets and property to be held by them, in trust, for the purposes set forth in said trust deed.

VII. That the trustees named therein accepted the trusts created by said trust deed and entered upon the execution of said trusts. That the said trustees filed the said trust deed with the Insurance Commissioner of the State of Connecticut.

VIII. That thereafter the said defendant Munich Re-Insurance Company engaged in the insurance business in the said State of Connecticut and in other states of the United States and entered into various agreements, treaties and contracts re-insuring the risks assumed by various persons, firms, associations and corporations in the United States.

IX. That thereafter and on or about February 26, 1912, the said Ernst Thalmann died and the defendant Walter T. Rosen
114 was duly appointed by said Munich Re-Insurance Company to succeed said Ernst Thalmann as a trustee under said trust deed. That said Walter T. Rosen accepted the trusts created in said trust deed and entered upon the execution of said trusts.

X. That thereafter and during the year 1917 the said Isaac N. Seligman and the said Hermann Sielcken died, and on or about November 8, 1917, the plaintiffs Rudolf Metz and J. Markham Marshall were duly appointed by the said Munich Re-Insurance Company to succeed the said Isaac N. Seligman and Hermann Sielcken as trustees under the said trust deed. That the said plaintiffs accepted the trusts created in said trust deed and entered upon the execution of the said trusts.

XI. That the plaintiff trustees have prepared and submitted the following account showing, to the best of their ability, the securities and moneys received from their predecessor trustees, the income received by the plaintiff trustees, the proceeds of the disposition of a portion of said securities, the payments and disbursements of money made by the plaintiff trustees and the securities and moneys now held by the trustees under said trust deed:

115 SCHEDULE A.

Being a Statement of the Securities and Cash Received by the Plaintiff Trustees from Their Predecessor Trustees.

Bonds.

Description.	Face amount.
Imperial German Government Treasury Bonds 5% 1918	$200,000
United States Government Registered Gold 4% 1925...	140,000
United States Government Coupon Gold 4% 1925.....	50,000
New York City Registered Gold 3½% 1917.....	50,000

Description.	Face amount.
Atchison, Topeka & Santa Fe Ry. Convertible 4% 1960.	10,000
Atlanta & Charlotte Air Line Ry. First Mortg. 4½% 1944	50,000
Atlantic Coast Line R. R. First Mortgage 4% 1952	75,000
Atlantic Coast Line R. R. Louisville & Nashville Coll. 4% 1952	25,000
Atlantic & Danville R. R. First Mortg. 4% 1948	30,000
Baltimore & Ohio R. R. Southwestern Division 3½% 1925	75,000
Baltimore & Ohio R. R. Prior Lien 3½% 1925	47,000
Baltimore & Ohio R. R. Convertible 4½% 1933	109,000
Baltimore & Ohio R. R. Equipment Series H 4½% 1921	10,000
Baltimore & Ohio R. R. Equipment Series I 4½% 1922.	10,000
116	
Baltimore & Ohio R. R. Equipment Series J 4½% 1923.	10,000
Baltimore & Ohio R. R. Refunding Mortgage 5% 1995.	25,000
Birmingham Ry. Light & Power Co. General Ref. 4½% 1954	11,000
Brooklyn Union Elevated R. R. 4-5% First Mortg. 5% 1950	50,000
Canada Southern Ry. Consolidated Guaranteed Series A 5% 1962	95,000
Central of Georgia R. R. Consolidated Mortg. 5% 1945.	95,000
Central R. R. of New Jersey Gen. Mortg. 5% 1987	5,000
Central Pacific Ry. First Ref. Mort. 4% 1949	125,000
Chesapeake & Ohio Ry. R. & A. Division First Cons. Mtg. 4% 1989	5,000
Chesapeake & Ohio Ry. General Mort. 4½% 1992	75,000
Chesapeake & Ohio Ry. Convertible 4½% 1930	25,000
Chicago & Alton R. R. Refunding Mortg. 3% 1949	50,000
Chicago, Burlington & Quincy R. R. Gen. Mortg. 4% 1958	75,000
Chicago & Eastern Illinois R. R. Gen. Cons. Mortg. 5% 1937	25,000
Chicago & Eastern Illinois R. R. Ref. & Imp. 4% 1955.	50,000
Chicago & Northwestern Ry. Gen. Mortg. 5% 1987	8,000
Chicago & Western Indiana R. R. Cons. Mortg. 4% 1952	50,000
Chicago, Lake Shore & Eastern Ry. First Mortg. 4½% 1969	25,000
117 Chicago, Milwaukee & Puget Sound Ry. First Mortg. 4% 1949	100,000
Chicago, Milwaukee & St. Paul Ry. Gen. Mortg. 4½% 1989	100,000
Chicago, Rock Island & Pacific Ry. Refunding 4%, 1934	50,000
Chicago Union Station Company First Mortg. 4½% 1963	50,000

	Description.	Face amount
	Cincinnati, Indianapolis, St. Louis & Chicago R. R. 4% 1936	10,000
	Cleveland, Cincinnati, Chicago & St. Louis R. R. Gen. Mtg. 4% 1993	39,000
	Colorado & Southern Ry. Ref. & Ext. 4½% 1935	50,000
	Delaware & Hudson Co. First & Refunding Mtg. 4% 1943	100,000
	Detroit & Mackinack R. R. First Lien 4% 1995	100,000
	Detroit Terminal & Tunnel First Mortg. 4½% 1961	50,000
	Erie R. R. Co. General Lien 4% 1996	50,000
	Erie Railroad Co. Prior Lien 4% 1996	25,000
	Erie Railroad Pennsylvania Coll. Trust 4% 1951	50,000
	Florida West Shore Ry. First Mtg. 5% 1934	25,000
	Hocking Valley Railway First Cons. Mortg. 4½% 1999	31,000
	Illinois Central R. R. St. Louis Division 3½% 1951	25,000
	Interborough Rapid Transit Co. First and Refunding Mortg. 5% 1966	50,000
	Kanawha & Michigan Ry. First Mtg. 4% 1990	10,000
	Kansas City, Fort Scott & Memphis Ry. Refunding 4% 1936	78,000
118	Kansas City Southern Ry. First Mortg. 3% 1950	164,000
	Kansas City Southern Ry. Ref. & Imp. 5% 1950	100,000
	Lake Erie & Western R. R. First Mortg. 5% 1937	4,000
	Lake Shore & Michigan Southern Ry. Deb. 4% 1931	48,000
	Louisville & Nashville R. R. St. Louis Div. Second Mtg. 3% 1980	16,000
	Macon, Dublin & Savannah R. R. First Mortg. 5% 1947	20,000
	Manhattan Ry. Consolidated Mtg. 4% 1990	25,000
	Minneapolis, St. Paul, Sault Ste. Marie Ry. 4% 1938	55,000
	Missouri, Kansas & Texas R. R. First Mortg. 4% 1990	25,000
	New York, Chicago & St. Louis R. R. Deb. 4% 1931	25,000
	New York, New Haven & Hartford R. R. Conv. Deb. 6% 1948	7,000
	New York, New Haven & Hartford R. R. Conv. Deb. 3½% 1956	90,000
	New York, Ontario & Western Ry. General Mtg. 4% 1955	100,000
	Norfolk & Western Ry. First Cons. Mortgage 4% 1996	50,000
	Northern Pacific R. R. Gen. Lien and Land Grant 3% 2047	50,000
	Northern Pacific R. R. Prior Lien 4% 1997	25,000
	Northern Pacific R. R. St. Paul, Duluth Div. 4% 1996	50,000
	Oregon R. R. & Navigation Consolidated 4%	
119	1946	50,000
	Oregon-Washington R. R. & Navigation Co. First & Ref. Mtg. 4% 1961	100,000
	Pennsylvania R. R. Consolidated Mtg. 4½% 1960	11,000
	Pennsylvania Company 4½% 1921	10,000
	Philadelphia Co. Convertible Deb. 5% 1922	50,000

Description.	Face amount.
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Cons. Mtg. 4½% 1963	50,000
Reading Company Gen. Mtg. 4% 1997	50,000
Rio Grande Western Railroad First Mortg. 4% 1939	20,000
San Antonio & Aransas Pass First Mortg. 4% 1943	50,000
Seaboard Air Line Ry. Atlanta-Birmingham Div. 4% 1933	50,000
Seaboard Air Line Ry. Refunding Mortg. 4% 1959	100,000
Seaboard Air Line Ry. First Cos. Mort. 6% 1945	50,000
Southern Pacific R. R. First Ref. Mortg. 4% 1955	108,000
Southern Pacific R. R. Central Pacific Collateral 4% 1949	25,000
Southern Ry. St. Louis Division First Mortg. 4% 1951	25,000
St. Louis, Iron Mountain & Southern Ry. Gn. Cons. 5% 1931	25,000
St. Louis & San Francisco Ry. Prior Lien Mortgage 4% 1950	112,500
St. Louis & San Francisco Railway Adjustment Mortg. 6% 1955	37,500
St. Louis Southwestern R. R. First Mortg. 4% 120 1989	50,000
Toledo & Ohio Central Ry. First Mortg. 5% 1935	12,000
Toledo & Ohio Central Ry. First Mortg. Western Division 5% 1935	15,000
Union Pacific R. R. First Lien & Refunding 4% 2008	50,000
Union Pacific Railroad First Mortg. 4% 1947	75,000
Union Pacific Railroad Convertible 4% 1927	150,000
United Railroads of San Francisco 4% 1927	75,000
Wabash Railroad First Mortgage 5% 1939	34,000
Wabash Railroad Omaha Division First Mortgage 3½% 1941	50,000
West Shore R. R. Co. First Mortgage 4% 2361	50,000
Western Maryland R. R. First Mortg. 4% 1952	75,000
Western New York & Pennsylvania R. R. General 3-4% 4% 1943	20,000
Wheeling & Lake Erie R. R. First Consolidated 4% 1949	25,000
Wisconsin Central Rys. Gen. Mortg. 4% 1949	74,000
Consolidated Gas Co. of New York Convertible 6% 1920	100,000
General Electric Company Deb. 5% 1952	35,000
Chicago, Milwaukee & St. Paul Ry. Conv. 4½% 1932	5,000
Pennsylvania R. R. Freight Equipment Reg. 4% 1919	9,000
Total bonds	$5,360,000

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Stocks.

Atchison, Topeka & Santa Fe Railroad, Preferred....	$25,00
New York, New Haven & Hartford Railroad.....	19,7
Norfolk & Western Railroad, preferred.....	20,0
Pennsylvania Railroad	75,0
Western Pacific Railroad, preferred.....	37,5
Western Pacific Railroad, common.....	56,2
Consolidated Gas Co. of New York.....	25,0
Total	$278,4

Cash.

Deposit account with Lackenburg, Thalmann & Co. of . $859,718.

SCHEDULE B.

Being a Statement of the Securities and Moneys Now Held by Trustees.

Bonds.

Description.	Face amount
Atlanta & Charlotte Air Line Ry. First Mortgage Bonds 4½% 1944	$50,0
Atlantic Coast Line R. R. Louisville & Nashville Coll. Bonds 4% 1952	25,0
Atlantic & Danville R. R. First Mortgage 4% Bonds 1948	30,0
Baltimore & Ohio R. R. Equipment Series "H" Bonds 4½% 1921	10,0
Baltimore & Ohio R. R. Equipment Series "I" Bonds 4½% 1922	10,0
Baltimore & Ohio R. R. Equipment Series "J" Bonds 4½% 1923	10,0
Baltimore & Ohio R. R. Refunding Mortgage Bonds 5% 1995	25,0
Birmingham Ry. Light & Power Co. General Refunding 4½% 1954	11,0
Broadway & Seventh Ave. R. R. First Mortgage Bonds 5% 1943	5,0
Brooklyn Union Elevated R. R. 4-5% First Mortgage 5% 1950	50,0
Central Railroad of New Jersey, General Mortgage 5% 1987	5,0
Central Pacific Ry. First Refunding Mortgage 4% 1949	125,0
Chesapeake & Ohio Ry. R. & A. Division I. Cons. Mtge. 4% 1989	5,0
Chesapeake & Ohio Ry. General Mortgage 4½% 1992	75,0

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	Description.	Face amount.
	Chesapeake & Ohio Ry. Convertible 4½% 1930	25,000
	Chicago & Alton R. R. Refunding Mortgage 3% 1949	50,000
	Chicago & Northwestern Ry. General Mortgage 5% 1987	8,000
	Chicago & Western Indiana R. R. Cons. Mortgage 4% 1952	50,000
123	Chicago, Lake Shore & Eastern Ry. First Mortgage 4½% 1969	25,000
	Chicago, Milwaukee & Puget Sound Ry. First Mortgage 4% 1949	100,000
	Chicago, Milwaukee & St. Paul Ry. General Mortgage 4½% 1989	100,000
	Chicago, Rock Island & Pacific Ry. Refunding 4% 1934	50,000
	Chicago Union Station Company First Mortgage 4% 1963	50,000
	Cincinnati, Indianapolis, St. Louis & Chicago R. R. 4% 1936	10,000
	Cleveland, Cincinnati, Chicago & St. Louis R. R. Genl. Mtf. 4% 1993	39,000
	Colorado & Southern Ry. Refunding & Ext. 4½% 1935	50,000
	Consolidated Gas Co. of New York, Convertible 6% 1920	100,000
	Delaware & Hudson Co. First & Refunding Mortgage 4% 1943	100,000
	Detroit & Mackinac R. R. First Lien 4% 1995	100,000
	Detroit Terminal & Tunnel First Mortgage 4½% 1961	50,000
	Erie Railroad Co. General Lien 4% 1996	50,000
	Erie Railroad Company Prior Lien 4% 1996	25,000
	Erie Railroad Pennsylvania Collateral Trust 4% 1951	50,000
	Florida West Shore Ry. First Mortgage 5% 1934	25,000
	German Imperial Government Treasury 5% 1918	200,000
124	Hacking Valley Railway First Cons. Mortgage 4½% 1999	31,000
	Illinois Central R. R., St. Louis Division 3½% 1951	25,000
	Interborough Rapid Transit Co. First & Refdg. Mtg. 5 1966	50,000
	Kanawaha & Michigan Ry. First Mortgage 4% 1990	10,000
	Kansas City, Fort Scott & Memphis Ry. Refunding 4% 1936	78,000
	Kansas City Southern Ry. First Mortgage 3% 1950	164,000
	Kansas City Southern Ry. Refunding & Impt. 5% 1950	100,000
	Lake Erie & Western R. R. First Mortgage 5% 1937	4,000
	Louisville & Nashville R. R. St. Louis Div., Second Mtg. 3% 1980	16,000
	Macon, Dublin & Savannah R. R. First Mortgage 5% 1947	20,000
	Manhattan Ry. Consolidated Mortgage 4% 1990	25,000
	Minneapolis, St. Paul, Sault Ste. Marie Ry. 4% 1938	55,000
	New York, Chicago & St. Louis R. R. Debentures 4% 1931	25,000
	New York, New Haven & Hartford R. R. Conv. Debentures 6% 1948	7,000

	Description.	Face amount
	New York, New Haven & Hartford R. Conv. Debentures 3½% 1956	[illegible]
	New York, Ontario Western Ry. General Mortgage 4% 1955	[illegible]
	Northern Pacific R. R. Prior Lien 4% 1997	25,000
125	Northern Pacific R. R. St. Paul, Duluth Division 4% 1996	50,000
	Oregon-Washington R. R. & Nav. Co. I & Refdg. Mtg. 4% 1961	[illegible]
	Philadelphia Company Convertible Debentures 5% 1922	50,000
	Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Cons. Mtg. 4½% 1963	50,000
	Reading Company General Mortgage 4% 1997	50,000
	Rio Grande Western R. R. First Mortgage 4% 1939	20,000
	San Antonio & Arkansas Pass First Mortgage 4% 1943	50,000
	Seaboard Air Line Ry. Atlanta Birmingham Division 4% 1933	50,000
	Seaboard Air Line Ry. Refunding Mortgage 4% 1959	100,000
	Seaboard Air Line Ry. 1st Consolidated Mortgage 6% 1945	50,000
	Southern Pacific R. R. Central Pacific Collateral 4% 1949	25,000
	Southern Ry. St. Louis Division First Mortgage 4% 1951	25,000
	St. Louis & San Francisco Ry. Prior Lien Mortgage 4% 1950	112,500
	St. Louis & San Francisco Railway Adjustment Mortgage 6% 1955	37,500
	St. Louis Southwestern R. R. First Mortgage 4% 1989	50,000
	Toledo & Ohio Central Ry. First Mortgage 5% 1935	12,000
	Toledo & Ohio Central Ry. First Mortgage Western Div. 5% 1935	13,000
126	Union Pacific R. R. First Lien & Refunding 4% 2008	50,000
	Wabash Railroad Omaha Division First Mortgage 3½% 1941	50,000
	Western Maryland R. R. First Mortgage 4% 1952	75,000
	Western New York & Pennsylvania R. R. General 3-4% 4% 1943	20,000
	Wheeling & Lake Erie R. R. First Consolidated 4% 1949	25,000
	Wisconsin Central Ry. First General Mortgage 4% 1949	74,000
	Atlantic Coast Line R. R. I. Cons. Mtg. 4% 1952	75,000
	Baltimore & Ohio R. R. Convertible 4½% 1933	14,000
	Chicago, Burlington & Quincy R. R. General Mortgage 4% 1958	25,000
	German Imperial Government Treasury Notes 5% 1918	125,000
	United States Government Registered Gold 4% 1927	50,000

Description.	Par amount.
Coupons of Chesapeake & Ohio Ry. R. & A. Division, 1. Gen. Mtg. not cashed	160
Coupons of German Imperial Government Treasury Bonds not cashed. Deposited with Ladenburg, Thalmann & Co.	10,000
Coupons of New York, New Haven & Hartford R. R. Conv. Debentures not cashed	1,575
Total	$3,959,675

Stocks.

Description.	Par value.
Atchison, Topeka & Santa Fe R. R. preferred 5%	$25,000
Consolidated Gas Company of New York 7%	25,000
Norfolk & Western Railroad preferred 4%	20,000
Pennsylvania Railroad 6%	75,000
Total	$145,000

Cash on Hand.

Deposit account with Ladenburg, Thalman & Co., New York, of $78,545.83 with all additions thereto and accrued interest at the rate of 3½%	$78,545.83

Schedule C.

Being a statement of the proceeds of the sales of securities in Schedule A not in the possession or under the control of the plaintiff trustees.

1917 Nov. 9	Sold	$ 1,000	Chicago & Western Indiana Railroad Consolidated Mortgage 4% Bonds of 1952, at 64	$ 652.97	
Dec. 10	"	50,000	Oregon Railroad & Navigation Consolidated 4% Bonds of 1946, at 79¾	39,862.50	
Dec. 11	"	40,000	United States Government 4% Bonds of 1925, at 104-1/16	41,777.78	
Dec. 11	"	150,000	Union Pacific Railroad Convertible 4% Bonds of 1927 at 81½	124,729.17	
Dec. 11	"	50,000	Northern Pacific General Lien and Land Grant 3% Bonds of 2047, at 58⅛	29,166.67	
Dec. 11	"	2,000	Baltimore & Ohio Prior Lien 3½% Bonds of 1925 at 86	1,748.61	
Dec. 11	"	12,000	New York Central 4% Bonds of 1931, at 83¾	10,088.33	
Dec. 11	"	5,000	Baltimore & Ohio Prior Lien 3½% Bonds of 1925 at 86	4,371.53	
Dec. 12	"	10,000	Pennsylvania Company 4½% Bonds of 1921, at 96	9,788.75	
Dec. 12	"	11,000	Pennsylvania Railroad Consolidated Mortgage 4½% Bonds of 1960, at 97	10,836.50	
1918 Feb. 19	Recd. for	50,000	New York City 3½% Bonds Corporate Stock due November 1, 1917	50,000.00	
Feb. 27	Sold	50,000	United States Government 4% Bonds of 1925, at 104¼	52,519.44	
Feb. 27	"	50,000	United States Government 4% Bonds of 1925, at 104¼	52,519.44	
Mar. 22	"	2,000	Lake Shore & Michigan Southern Railway Debenture 4% Bonds of 1931, at 83	1,688.89	
Apr. 9	"	1,000	Lake Shore & Michigan Southern Railway Debenture 4% Bonds of 1931, at 82½	841.31	
Apr. 9	"	1,000	Lake Shore & Michigan Southern Railway Debenture 4% Bonds of 1931, at 82½	841.31	
Apr. 10	"	30,000	Wabash Railroad First Mortgage 5% Bonds of 1939, at 92½	28,375.00	
Apr. 10	"	1,000	Wabash Railroad First Mortgage 5% Bonds of 1939, at 93	950.83	
Apr. 16	"	32,000	Lake Shore & Michigan Southern Railway Debenture 4% Bonds of 1931, at 81	26,466.67	

Schedules.

1918				
Apr. 23	Sold	$ 1,000	Wabash Railroad First Mortgage 5% Bonds of 1939, at 92¾	
Apr. 23	"	7,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 77⅝	950.14
Apr. 23	"	15,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82¾	5,512.11
Apr. 23	"	1,000	Atchinson, Topeka & Santa Fe Railway Convertible 4% Bonds of 1960, at 83	12,355.42
Apr. 24	"	50,000	West Shore Railroad Company First Mortgage 4% Bonds of 2361, at 75⅜	844.53
Apr. 24	"	2,000	Wabash Railroad First Mortgage 5% Bonds of 1939, at 92¾	38,252.78
Apr. 24	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78	1,900.56
Apr. 24	"	5,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78¼	785.38
Apr. 24	"	3,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78	3,933.13
Apr. 24	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82¼	2,356.13
Apr. 24	"	3,000	Atchison, Topeka & Santa Fe Railway Convertible 4% Bonds of 1960, at 83	823.81
Apr. 25	"	7,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87	2,533.92
Apr. 25	"	1,000	Southern Pacific, at 77¾	6,169.92
Apr. 25	"	6,000	Atchison, Topeka & Santa Fe Railway Convertible 4% Bonds of 1960, at 83	788.92
Apr. 26	"	5,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955 at 77¾	5,068.50
Apr. 26	"	10,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78½	3,945.14
Apr. 26	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82¼	7,906.25
Apr. 29	"	10,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78½	824.03
Apr. 29	"	1,000	Uinon Pacific Railroad First Mortgage 4% Bonds of 1947, at 87	7,910.00
1918				
Apr. 29	Sold	$ 2,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87	881.86
Apr. 29	"	5,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 77¾	1,763.72
Apr. 29	"	4,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78½	3,946.81
Apr. 29	"	2,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87	3,164.00
Apr. 29	"	7,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87	1,763.72
				6,173.03

Schedules.

Apr. 30	"	5,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78½.....	3,955.63
Apr. 30	"	2,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 78.....	1,583.94
Apr. 30	"	3,000	Union Pacific First Mortgage 4% Bonds of 1947, at 87.....	2,645.92
May 1	"	2,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 78½.....	1,582.50
May 1	"	5,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87½.....	4,435.42
May 1	"	5,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87.....	4,410.42
May 1	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82½	823.33
May 1	"	3,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947 at 87.....	2,646.25
May 1	"	10,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 87.....	8,820.83
May 3	"	5,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82½	4,136.53
May 6	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 82½	827.54
May 7	"	2,000	Canada Southern Railway Consolidated Guaranteed Series A 5% Bonds of 1962, at 90½.....	1,817.50
May 17	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 83¼	836.36
1918				
May 17	Sold	2,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 83	1,667.72
May 17	"	3,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 83	2,501.58
May 17	"	2,000	General Electric 5% Bonds of 1952, at 98	1,978.61
May 17	"	2,000	General Electric 5% Bonds of 1952, at 98¼	1,983.61
May 20	"	2,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996 at 83¼	1,673.39
May 20	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996 at	836.69
May 20	"	4,000	General Electric 5% Bonds of 1952, at 98¼	4,007.22
May 20	"	1,000	General Electric 5% Bonds of 1952, at 98¼	1,000.56
May 21	"	1,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 83¼.....	836.81
May 28	"	5,000	General Electric 5% Bonds of 1952, at 98¼	4,972.92

Schedules.

May 29	"	4,000	Norfolk & Western First Consolidated Mortgage 4% Bonds of 1996, at 84⅛	3,385.78
May 29	"	3,000	General Electric 5% Debenture Bonds of 1952, at 98⅜	2,984.17
June 1	"	4,000	General Electric 5% Bonds of 1952, at 98¼	3,976.11
June 4	"	1,000	General Electric 5% Bonds of 1952, at 98¼	994.17
June 5	"	2,000	General Electric 5% Bonds of 1952, at 98¼	1,988.61
June 6	"	2,000	Canada Southern Railway First Consolidated Guaranteed Series A 5% Bonds of 1962, at 91¾	1,850.56
June 7	"	1,000	Canada Southern Railway First Consolidated Guaranteed Series A 5% Bonds of 1962, at 91¾	925.42
June 11	"	1,000	Canada Southern Railway First Consolidated Guaranteed Series A 5% Bonds of 1962, at 91¾	925.97
June 11	"	4,000	Canada Southern Railway First Consolidated Guaranteed Series A 5% Bonds of 1962, at 91¾	3,703.89
June 12	"	6,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 79	4,839.83
1918 June 12	Sold	1,000	General Electric 5% Bonds of 1952, at 97¼	985.28
June 13	"	5,000	General Electric Debenture 5% Bonds, at 97¼	4,927.08
June 17	"	5,000	General Electric Debenture 5% Bonds, at 97¼	4,929.86
June 18	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 79½	807.13
June 18	"	4,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, 79½	3,228.50
June 25	"	5,000	Union Pacific Railroad 1st Mortgage 4% Bonds of 1947, at 84½	4,315.42
June 25	"	25,000	Union Pacific Railroad First Mortgage 4% Bonds of 1947, at 84½	21,577.08
July 1	"	1,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 78	798.75
July 2	"	5,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 86⅞	4,379.86
July 9	"	6,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 78⅛	4,692.83
July 11	"	3,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 79	2,415.00
July 13	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 79	805.50
July 18	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 79	805.88
July 24	"	2,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 78	1,562.61

Schedules.

July 30	"		5,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955 at 78¼	3,922.36
Aug. 5	"		4,000	Central of Georgia Railway Consolidated Mortgage 5% Bonds of 1945, at 86½	3,507.22
Aug. 5	"		1,000	Central of Georgia Railway Consolidated Mortgage 5% Bonds of 1945, at 86¼	876.81
Aug. 6	"		1,000	Central of Georgia Railway Consolidated Mortgage 5% Bonds of 1945, at 86½	1,753.89
Aug. 6	"		5,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 80½	4,088.19
1918					
Aug. 8	Sold	$	5,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 86¼	4,373.61
Aug. 8	"		14,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 77	10,820.06
Aug. 9	"		1,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 77¼	775.47
Aug. 9	"		10,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 77	7,729.72
Aug. 9	"		7,000	Norfolk & Western Railway First Consolidated Mortgage 4% Bonds of 1996, at 80½	5,725.81
Oct. 15	"		5,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 79⅛	4,007.78
Oct. 15	"		5,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 79¼	4,014.03
Oct. 15	"		5,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 89¼	4,570.14
Oct. 17	"		10,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933 at 78	8,270.00
Oct. 17	"		10,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 90	9,218.06
Oct. 18	"		10,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 90¼	9,244.44
Oct. 21	"		3,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 80⅝	2,451.67
Oct. 21	"		3,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 90½	2,782.08
Oct. 21	"		2,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 90⅝	1,857.22
Oct. 21	"		3,000	Southern Pacific Railroad First Mortgage Refunding 4% Bonds of 1955, at 80¼	2,440.42

Schedules.

Oct. 29	"	3,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 91	
Oct. 30	"	5,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 91	2,800.42
Oct. 31	"	5,000	Southern Pacific Railroad First Refunding Mortgage 4% Bonds of 1955, at 81	4,068.06
1918				4,110.42
Nov. 1	Sold	$ 4,000	Central of Georgia Railroad Consolidated Mortgages 5% Bonds of 1945, at 92	
Nov. 1	"	1,000	Central of Georgia Railroad Consolidated Mortgage 5% Bonds of 1945, at 92	3,675.00
Nov. 14	"	7,000	Southern Pacific First Refunding Mortgage 4% Bonds of 1955, at 85¾	928.75
Nov. 14	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 86⅞	6,097.19
Nov. 14	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 87	876.63
Nov. 14	"	8,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 86½	877.88
Nov. 18	"	10,000	Central of Georgia Railroad Consolidated First Mortgage 5% Bonds of 1945, at 94⅜	6,983.00
Nov. 19	"	1,000	Central of Georgia Railroad Consolidated First Mortgage 5% Bonds of 1945, at 94⅜	9,448.61
Nov. 20	"	2,000	Central of Georgia Railroad Consolidated First Mortgage 5% bonds of 1945, at 94⅜	945.00
Nov. 20	"	3,000	Central of Georgia Railroad Consolidated First Mortgage 5% Bonds of 1945, at 94⅜	1,890.28
Nov. 29	"	1,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 85⅞	2,835.42
Nov. 29	"	4,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933 at 85	868.50
Dec. 2	"	19,000	Central of Georgia Railroad Consolidated First Mortgage 5% Bonds of 1945, at 92½	3,439.00
Dec. 5	"	5,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 84	17,561.81
Dec. 10	"	5,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 84¼	4,252.50
Dec. 10	"	5,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 84¼	4,268.13
Dec. 11	"	3,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 84¼	4,280.63
Dec. 11	"	2,000	Baltimore & Ohio Railroad Convertible 4½% Bonds of 1933, at 84¼	2,576.25
				1,717.50
			Total	$ 927,095.96
		$1,123,000		

Schedules.

SCHEDULE D.

Being a statement of income received by plaintiff trustees.

1917			
Nov.	20	Norfolk & Western R.R. stock rights	$ 200.00
Dec.	8	Coupons, value December 4, 1917	6,592.50
	31	Interest on account with Ladenburg, Thallmann & Co. New York, N. Y. at 3½% from Sept. 30 to Dec. 31, 1917	5,670.02
1918			
Jan.	8	Coupons value January 3, 1918	29,537.50
	9	Coupons value January 8, 1918	3,675.00
	10	Coupons value	1,362.50
	15	Coupons value January 14, 1918	2,200.00
	15	Coupons value January 15, 1918	210.00
	19	Check for December, 1917, dividend 1¾% on 250 shares Consolidated Gas Company of New York	437.50
Feb.	1	February 1918 interest on $50,000 U. S. Government 4% registered gold bonds of 1925	500.00
	1	February, 1918 interest on $50,000 U. S. Government 4% registered gold bonds of 1925	500.00
	8	February dividend 2½% on 250 shares of Atchinson, Topeka & Santa Fe R.R. pref.	625.00
	14	February interest on $50,000 U. S. bonds of 1925, value Feb. 1, 1918	500.00
	20	February dividend on 375 shares of Western Pacific R.R. preferred	562.50
	23	Coupons, value Feb. 21, 1918	8,037.50
Mar.	4	March 1918 coupons on $109,000 of Baltimore & Ohio R.R. convertible 4½% bonds of 1933 value March 2, 1918	2,452.50
	4	General Electric Company debentures 5% of 1952, value March 2, 1918	875.00
	4	Coupons	8,927.50
	31	Interest on account with Ladenburgh Thalmann & Co. New York, at 3½% Dec. 31, 1917, to March 31, 1918	1,685.74
Apr.	2	Coupons on $50,000 Norfolk & Western Railway Company 4% bonds of 1996	1,000.00
	2	Coupons on $95,000 of Canada Southern R.R. Conv., guaranteed Series A 5% bonds of 1962	2,375.00
	2	Dividends on 375 shares Western Pacific R.R. pref. value April, 1918	562.50
	4	Coupons, value April 3, 1918	14,512.50
May	2	May 1918 coupons on $95,000 Central of Georgia Railroad Company, Cons. Mortgage 5% bonds of 1945	2,375.00
	2	May 1918 interest on $50,000 U. S. Government 4% bonds of 1925	500.00
	7	Coupons value May 3, 1918	9,300.00
June	3	June 1918 coupons on $5,000 Chicago, Milwaukee & St. Paul general mortg. 4½% bonds of 1989	112.50
	5	Coupons, value of June 3, 1918	7,592.50

Schedules.

1918				
June	12	December 1, 1917, interest on $25,000 Missouri, Kansas & Texas R. R. Company first mortg. 4% bonds of 1990		500.00
	30	Interest on account with Ladenburg, Thalmann & Co. New York, at 3½% from March 31 to June 30, 1918		1,066.86
July	2	July 1918 dividend on 375 shares of Western Pac. R.R. pref. value July 1, 1918		562.50
	3	July 1918 coupons on $82,000 So. Pac. 1st refg. mtg. 4% bonds of 1955		1,640.00
	8	Coupons, value July 2, 1918		14,042.50
	8	Coupons, value July 2, 1918		15,060.00
	19	Collect. New Haven coupons	$210.00	
		less exchange	.20	209.80
Aug.	2	August 1918 interest on $50,000 U. S. Government 4% bonds of 1925, value August 1, 1918		500.00
	21	Coupons, value August 21, 1918		8,037.50
	21	Check, Norf. & West. Ry. Co. stk. rights		200.00
Sept.	4	Coupons on $59,000 Baltimore & Ohio R.R. convertible 4½% bonds of 1933		1,327.50
	5	Coupons, value September 4, 1918		5,927.50
	21	September coupons on $75,000 Chicago, Burlington & Quincy R.R. general mortgage 4% bonds of 1958, value September 4, 1918		1,500.00
	21	Coupons on $75,000 Atlantic Coast Line R.R. first mortgage 4% bonds of 1952, value September 4, 1918		1,500.00
	23	August 1, 1918, dividend on 250 shares of Atchison, Top. & S. Fe R.R. pref.		625.00
	30	Interest on account with Ladenburg, Thalmann & Co. New York, from June 30 to September 30, 1918		953.77
Oct.	2	October Dividend at 1½% on 375 shares of Western Pacific Railway preferred, value Oct. 1, 1918		562.50
	2	Coupons on $85,000 Canada Southern Railway Consolidated guaranteed Series A 5% bonds of 1962		2,125.00
	3	Coupons on $2,500 St. Louis, Southwestern Railroad general mortgage 5% bonds of 1931, value Oct. 2, 1918		625.00
	5	Coupons Value October 3, 1918		13,917.50
Nov.	1	November 1918 interest on $50,000 U. S. Government 4% bonds of 1925		500.00
	4	November coupons on $40,000 of Central of Georgia Railroad Consolidated mortgage 5% bonds of 1945, value November 2, 1918		1,000.00
	4	Coupons		9,300.00
	2	Norfolk & Western Railway Company stock rights		200.00
Dec.	3	Pennsylvania R.R. stock rights		1,125.00
	6	June coupons on $25,000 Missouri, Kansas & Texas Railroad, first mortg. 4% bonds of 1990		500.00

Schedules.

1918			
Dec. 7	Coupons, value December 5, 1918		7,592.50
7	December coupons on $5,000 St. Paul 4½% bonds of 1932, value December 6, 1918		112.50
13	Distribution of 66-1/3c. per thousand dollar bond ordered by court on $75,000 of Chicago, Rock Island & Pacific collateral trust 4% bonds of 2002		49.75
18	Consolidated Gas Company of New York stock rights		437.50
31	Interest on account with Ladenburg Thalmann & Co. New York, at 3½% from September 30 to December 31		688.75
1919			
Jan. 8	January 1919 dividend on 375 shares Western Pacific Railroad preferred at 1½%		562.50
9	Coupons collected, value of Jan. 6		26,115.00
10	Collect New Haven	$1,575.00	
	exchange	1.57	1,573.43
31	Interest on account with Ladenburg, Thalmann & Co. New York, at 3½% from Dec. 31, 1918 to Jan. 31, 1919		219.13
	Total		$316,637.57

SCHEDULE E.

Being a statement of payments made by plaintiff trustees.

1917			
Nov. 12	Paid to Springfield Fire & Marine Ins. Co. Western Dept. Chicago		$240,329.24
12	Paid to Milwaukee Mechanics Ins. Co. Milwaukee		153,408.35
12	Paid to Concordia Fire Ins. Co. Milwaukee		65,707.43
12	Paid to Security Ins. Co. of New Haven, Conn.		51,435.69
12	Paid to Springfield Fire & Marine Ins. Co. Springfield		30,946.43
13	Bought $1,000 Chicago & West Ind. 4's 1952 63½		650.92
14	Paid Rome Ins. Co. as per letter of 11/18		19,889.88
30	Paid to O. Ehmann		2,377.50
Dec. 21	Paid to Hanover Fire Ins. Co		160,927.25
27	Check #8049 to Munich Re-Insurance Co		10,286.26
27	Check #8050 to Munich Re-Insurance Co		10,658.09
28	Paid to Germania Fire Ins. Co		75,212.60
28	Check #8047 to Munich Re-Insurance Co		7,068.32
31	Check #8048 to Munich Re-Insurance Co		10,546.63
31	Check #8051 to Munich Re-Insurance Co		19,810.54
31	Transfer to regular account Munich Re-Insurance Co.		5,670.02

Schedules.

1918			
Jan.	7	Check #8052 to Munich Re-Ins. Co.	19,697.73
	19	Paid to Germania Fire Ins. Co.	33,492.45
	26	Paid to Hartford Fire Ins. Co. Hartford	28,337.50
Feb.	11	Paid to First Re-Inc. Co. of Hartford	79,783.38
	28	Paid to Citizens Ins. Co. Hartford	75,000.00
Mar.	22	Paid to Ins. Co. of the State of Penn., Phila.	31,605.34
	22	Paid to First Ins. Co. of Hartford	42,855.34
	31	Transfer to regular account Munich Re-Insurance Co.	1,685.74
Apr.	11	Paid to Citizens Ins. Co. Hartford	46,652.69
	19	Paid to Ins. Co. of the State of Penn., Phila.	495,588.05
	19	Paid to Firemen's Ins. Co. Newark	46,253.53
May	4	Paid to Ins. Co. of the State of Pa.	5,458.90
	4	Paid to Firemen's Ins. Co. Newark	12,793.50
	11	Paid to Firemen's Ins. Co. Newark	17,918.23
	11	Paid to Firemen's Ins. Co. Chicago	18,242.37
	20	Difference in interest on sale of $5,000 Gen. Elect. 5's 1952 M. S. figured as J. J. 4 mos. 19 days should be 2 mos 19 days	41.67
	24	Paid to First Re-Ins. Co. Hartford	17,975.37
	24	Paid to Ins. Co. of State of Penn., Phila.	18,456.71
	24	Paid to Ins. Co. of State of Penn., J. S. Frelinghuysen, Gen. Agents	5,425.85
	25	Paid to Ins. Co. of State of Penna., Phila.	19,555.91
June	8	Paid to Firemen's Ins. Co. Newark	14,711.98
	8	Paid to Firemen's Ins. Co. Chicago	11,603.83
	25	Paid to First Re-Insurance Co. Hartford	3,575.22
	25	Paid to Ins. Co. of the State of Penn., Phila.	23,707.69
1918			
June	30	Transfer to regular account of Munich Re-Insurance Co.	1,066.86
July	1	To cash in lieu of July 1, 1918, interest on $1,000 So. Pac. Ref. 4s, 1955, sold	20.00
	22	Paid to Ins. Co. of the State of Penn., N. Y.	2,162.83
	22	Paid to Firemen's Ins. Co. Chicago	10,483.69
	22	Paid to Ins. Co. of the State of Penn., Phila.	15,048.04
	22	Paid to Firemen's Insurance Co., Newark	8,007.06
Aug.	10	Paid to Firemen's Ins. Co. Chicago	15,067.14
	10	Paid to Home Ins. Co. N. Y.	2,995.25
Sept.	4	Paid to Ins. Co. of the State of Penn., Phila.	13,462.77
	4	Paid to Firemen's Ins. Co. Newark	6,695.10
	12	Paid to Firemen's Ins. Co. Newark	7,978.43
	28	Paid to Firemen's Ins. Co. Newark	6,442.12
	26	Paid to Firemen's Ins. Co. Newark	6,502.84
	30	Transfer to regular account of Munich Re-Insurance Co.	953.77
Oct.	4	Transfer to regular account of Munich Re-Ins. Co. September coupons on $50,000 B & O c. 4½ 1933 value September 4	1,327.50
	15	Paid to Insurance Co. of the State of Penn., Phila.	15,616.61
	28	Paid to Insurance Co. of the State of Penn., Phila.	8,468.24
Nov.	18	Paid to Firemen's Ins. Co. Chicago	53,731.11
	18	Paid to Firemen's Ins. Co. Newark	45,328.41
Dec.	2	Paid to Ins. Co. of the State of Penn., Phila.	13,087.23
	2	Paid to Firemen's Ins. Co. Chicago	5,438.30
	3	Paid to Firemen's Ins. Co. Newark	7,308.05
	18	Paid to Ins. Co. of the State of Penn., Phila.	11,606.02
1919			
Jan.	7	To charges on coupons sent to New Haven	.40
		Total	$1,748,131.00

138 SCHEDULE F.

Summary Statement of Account.

Cash and part value of securities received by these trustees as per Schedule "A"		$6,478,168.00
Par value of securities in the possession of the trustees as per Schedule "B"	$4,104,675.00	
Par value of securities sold by trustees as per Schedule "C"	1,123,000.00	
		5,227,675.00

Statement of Moneys Received.

Received from sale of securities as per Schedule "C"		$927,095.98
Received income as per Schedule "D"		316,637.55
Total moneys received by trustees		$1,243,733.53
Payments made by trustees as per Schedule "E"		1,748,131.00

XII. That the items set forth in the foregoing account are correct, but that the account is not complete, that the plaintiff trustees are unable to submit a full, true and accurate account because the defendant A. Mitchell Palmer as Alien Property Custodian has seized and holds in his possession the books of account, records and other papers containing the record of all transactions of the trustees with respect to said trust fund.

XIII. That these plaintiffs have joined herein as defendants all persons, firms, associations and corporations known to them
139 who as policy holders or creditors, or otherwise, have or claim, or either now or at some future time might have or might claim to have any right against the plaintiffs as such trustees or any right or interest, legal or equitable, against, in or in respect of the said trust funds, or some part thereof, now in the possession or under the control of the trustees under said trust deed.

On information and belief, that the following defendants are corporations organized and existing under and by virtue of the laws of the State of Connecticut: Aetna Insurance Company, Aetna Life Insurance Company, Hartford Fire Insurance Company, Travellers Life Insurance Company and the Security Insurance Company of New Haven.

On information and belief, that the defendants American Insurance Company and Firemans Insurance Company are corporations organized and existing under and by virtue of the laws of the State of New Jersey.

On information and belief, that the defendants Milwaukee Mechanics Insurance Company of Wisconsin and the Concordia Fire Insurance Company are corporations organized and existing under and by virtue of the laws of the State of Wisconsin.

On information and belief, that the defendant Pacific Mutual Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of California; that the defendant Citizens' Insurance Company of Missouri is a corporation organized and existing under and by virtue of the laws of the State of Missouri; that the defendant The Insurance Company of the State of Pennsylvania is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania;
140 that the defendant United States Fidelity & Guaranty Company is a corporation organized and existing under and by virtue of the laws of the State of Maryland; that the defendant Springfield Fire and Marine Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts.

On information and belief that the following defendants are corporations organized and existing under and by virtue of the laws of the State of New York; Agricultural Insurance Company, National Liberty Insurance Company, Pacific Fire Insurance Company, Buffalo Insurance Company, The Fidelity & Casualty Company of New York, Preferred Accident Insurance Company of New York, Flint & Co., Inc., and Leaycraft & Co., Continental Fire Insurance Company, Hanover Fire Insurance Company, Home Insurance Company, United States Casualty Company.

On information and belief, that at all the times hereinafter mentioned the following named persons, firms and corporations, to wit: James Crosby Brown, Howland Davis, James M. Edwards, M. Orme Wilson, Horace Havemeyer, Thomas H. Kelly, James L. Laidlaw, John T. Terry, John E. Berwind, Adrian Iselin, Jr., Ernest Iselin, Lewis Iselin and Columbus O'Donnell Iselin, co-partners doing business under the firm name and style of A. Iselin & Co.; Adrian Iselin, Jr., J. D. Barrett, H. H. Rogers, W. R. Peters, Frank A. Vanderlip, Howard P. Sweetser, P. A. S. Franklin, Arthur B. Claflin, Charles N. Lee, William Sloane, J. Ogden Armour, Joseph J. O'Donohue, Jr., W. R. Thomas, J. Adolph Mollenhauer,
141 O. M. Mitchell, G. S. Dearborn, Flint & Co., Edward C. Hoyt, Warren G. Horton, Lewis H. Lapham, Carleton H. Palmer, Stephen Loines, William E. Iselin, William P. Clyde, H. A. Berwind, Charles M. Smith, S. De Ridder, Edmund Treaton, Leaycraft & Co., Adolph Norden; Louis Watjen and Stephen Edward Nash, co-partners doing business under the firm name and style of Watjen, Teed & Co., Robert K. Smith, Louis Watjen, Henry R. Mallory, Silas D. Webb, Orville T. Waring, H. St. John Webb, George H. Ware, Edward L. Tucker, Charles D. Lanier, John Pierpont Morgan, Edward T. Stotesbury, Charles Steele, Henry P. Davison, Arthur E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont, Horatio G. Lloyd, Dwight W. Morrow, Edward Stettinius and Thomas Cochran, doing business under the firm name and style of J. P. Morgan & Co.; Henry P. Davidson, J. Pierpont Morgan, Lewis Iselin, Levi P. Morton, Walter P. Bliss, George B. Agnew, W. Redmond Cross, William B. Good-

win, Herman S. Crossman, Frederick W. White, James Frown, C. S. Mathews, Seth M. Milliken, Louis Muller, F. A. Meyer, Charles A. O'Donohue, Stephen W. Carey, Bernard McCloskey, James B. Post, James R. Dickson, Charles W. McCutcheon, Joseph M. Cudahy, Charles T. Torrey, John D. Ryan, Herbert Appelton, Alba B. Johnson, James Dobson, W. J. McCahan, Robert H. McCurdy, Samuel Sloan, Edward T. Bedford, Louis F. Swift, B. N. Baker, John E. Hurst, F. W. Wood, E. Levering & Co., Eugene Blackford,

142 Alex J. Godley, William H. Dix, Charles C. Homer, Jr., Joshua Levering, F. W. Wilson & Son, Edwin F. Atkins, Blanchard Randall, R. Brent Keyser, Waldo Newcomer, Edward H. Sanford, Douglass F. Cox and S. T. Morgan

were separate insurers and underwriters associated and doing business under the name and style of "United States Lloyds," insuring against loss or damage to property by fire; that each of the aforesaid underwriters was duly represented and acted through the defendants Herbert Appleton and Douglass F. Cox, and that their business as such underwriters was and now is conducted and managed by the said defendants Herbert Appleton apd Douglass F. Cox as their duly authorized attorneys in fact.

That the persons, firms, associations and corporations which are joined herein as defendants, other than Munich Re-Insurance Company, Walter T. Rosen and A. Mitchell Palmer, have been thus made defendants as being persons, firms, associations and corporations who as policy holders or creditors, or otherwise, have or claim, or have had such business transactions with the defendant Munich Re-Insurance Company that they may now have or at some future time might have or might claim to have, some right against the plaintiffs as such trustees, or some right or interest, legal or equitable, against, in or in respect of said trust fund, or some part thereof, now in the possession or under the control of the trustees under said deed of trust.

143 That A. Mitchell Palmer has been made a defendant herein because as Alien Property Custodian appointed under the Act of Congress entitled "Trading with the enemy Act" approved October 6, 1917, he has demanded and now demands that the plaintiff trustee and said defendant trustee Walter T. Rosen transfer, assign, deliver and pay over to him as such Allien Property Custodian all the securities and property held by the said trustees under said trust deed, to be by him held, administered and accounted for as provided by law.

That the defendant, Walter T. Rosen, is jointly interested with the plaintiffs as co-trustee, in this cause of action; that before bringing this action said plaintiff trustees requested said defendant, Walter T. Rosen, to join as a co-plaintiff herein, but he refused so to do, and therefore, is made a defendant.

That the plaintiffs herein believe that there may be certain other persons, firms, associations and corporations who as policy holders or creditors in the United States have or claim, or either now or at some future time might have or might claim to have some right

against the plaintiffs as such trustees, or some right or interest, legal or equitable, against, in or in respect of the said trust funds, but whose names are unknown to these plaintiffs; that the said persons, firms, associations and corporations have been described and designated herein as defendant or defendants Blank Company, Doe & Roe, John Doe, Jane Doe, Richard Roe, Jane Roe, Richard Styles and Rebecca Styles, all unknown to these plaintiffs, and such persons so designated are intended to be any and all persons, firms associations and corporations not herein specifically joined
144 who, individually or in any fiduciary capacity, as policy holders or otherwise, have or claim to have, or have had such business transactions with the defendant Munich Re-Insurance Company that they may now have or at some future time might have or might claim to have, some right against the plaintiffs as such trustees, or some right or interest, legal or equitable, against, in or in respect of the said trust fund.

XIV. That the defendant Munich Re-Insurance Company has ceased doing business in the United States and that the plaintiff trustees desire to wind up their trust as such trustees and to turn over the trust funds held under the said trust deed to the persons, firms, associations and corporations entitled thereto.

Second.

For a Second Cause of Action.

XV. That the plaintiffs repeat and re-allege as part of this cause of action each and all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XIII of the first cause of action, with like effect as if herein fully re-alleged, and incorporate herein all the facts therein set forth.

XVI. That on or about April 6, 1917, the existence of a state of war between the governments of the United States of America and the German Empire was declared.

XVII. That the defendant A. Mitchel Palmer was duly appointed, has qualified and was at all the times hereafter mentioned
145 and now is acting as Alien Property Custodian under the provisions of the Act of Congress entitled "Trading with the Enemy Act," approved October 6, 1917, and the amendments thereto and the executive orders and proclamations issued pursuant thereto.

XVIII. That on or about February 12, 1919, the said defendant A. Mitchell Palmer demanded that the said plaintiffs and said defendant Walter T. Rosen transfer, assign, deliver and pay over to him as Alien Property Custodian all the securities and properties held by them under the said trust deed to be held by him, administered and accounted for as provided by law; that said demand has not been revoked or withdrawn.

XIX. That the trustees now have in their possession securities of the par value of $4,104,675, and cash deposited with Ladenburg, Thalmann & Co. of New York amounting to $78,545.83, with all additions thereto and accrued interest at the rate of 3½%, which said securities and money are held by the said trustees pursuant to the provisions of the said statutes of the State of Connecticut and the said trust deed.

XX. That many claims against the defendant Munich Re-Insurance Company by policy holders and creditors in the United States are now outstanding and unpaid. That the plaintiffs cannot state the exact amount of these claims, but allege, on information and belief, that the same aggregate several hundred thousand dollars.

XXI. That under the provisions of the agreements, treaties and contracts entered into by said defendant Munich Re-Insur-
146 ance Company as aforesaid, the said defendant is liable for all losses occurring during the period covered by such agreements, treaties, and contract, and claims based on such losses may be made after the termination of such agreements, treaties and contracts. By reason of these facts, it is not now possible to ascertain the amount of claims against the said defendants which may be asserted by policy holders and creditors in the United States but a large number of such agreements, treaties and contracts was entered into by the said defendant, the amount of the risks thus insured against was far in excess of the value of the said trust funds, and the plaintiffs therefore allege that such claims against the said plaintiffs may aggregate an amount equal to or in excess of the value of the said trust fund.

Wherefore the plaintiff trustees pray judgment that their accounts as such trustees as aforesaid be passed by and under the direction of this Court and that this Court by its decree discharge them as such trustees as aforesaid from all liability, responsibility and accountability for all of their and each of their acts and doings as such trustees, and that this Court make its decree as to the disposition of the funds and assets now in the hands or under the control of said trustees as above set forth, and that these plaintiffs be allowed a reasonable allowance for their services as such trustees, and their costs and expenses in this action; and the plaintiffs further pray judgment that this Court will instruct them as to their duties as trustees and as to whether, pending the judicial settlement of their accounts and their discharge as such trustees, they ought to
147 continue to hold the said moneys, securities and property now in their hands, or any part thereof, for the security and protection of the policy holders and creditors of the said defendant Munich Re-Insurance Company in the United States, or whether they should transfer, assign, deliver and pay over the moneys, securities and property now in their hands to the said defendant A. Mitch-

ell Palmer as Alien Property Custodian; and for such other, further and general relief as to this Court may seem just and proper.

ROOT, CLARK, BUCKNER & HOWLAND,
Plaintiffs' Attorneys.

Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Rudolf Metz, being duly sworn, deposes and says, that he is one of the trustees above named; that he has read the foregoing complaint and knows the contents thereof; and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

RUDOLF METZ.

Sworn to before me this 3rd day of March, 1919.

WILLIAM HAMPEL,
[SEAL.] #30, *Notary Public, County of N. Y.*

148 *Opinion.*

United States District Court, Southern District of New York.

Francis G. Caffey, United States Attorney, Proctor for libellants; La Rue Brown, Spier Whitaker and Earl B. Barnes, Counsel.
Root, Clark, Buckner & Howland, Proctors for claimants; Emory R. Buckner, S. W. Howland and Clinton Combes, Counsel.

AUGUSTUS N. HAND, *District Judge:*

These two libels are brought under Section 17 of the Trading with the Enemy Act to obtain the aid of this Court in securing the possession of property determined by the Alien Property Custodian
149 after investigation to be held for or on behalf of or for the benefit of the Munich Insurance Company, a German Corporation and an alien enemy.

The Munich Insurance Company sought to do business in the State of Connecticut. The Statutes of that State forbade any insurance company to expose itself to loss on any one risk to an amount exceeding ten per cent of its paid up capital and provided that the capital of a foreign insurance company should be: (*a*) Money or securities deposited with the treasurer of the state or with the proper officer of some other state, the minimum amount of such deposit to be $200,000. (*b*) All sums loaned on real estate security in any state of the United States in which fire insurance companies organized under the laws of Connecticut might invest, "provided such real estate, securities and assets shall be held in the United States by

trustees who are citizens of the United States approved by the Insurance Commissioner, for the benefit of all its policy holders and creditors in the United States."

By reason of the statute the Munich Insurance Company executed a trust deed which required the trustees to receive and safely keep all assets and property from time to time delivered to them, "the same to be held, used and appropriated to and for satisfying the purposes in the act of the Legislature above mentioned."

Article Fourth of the trust deed provides: "If at any time debts and liabilities for the security of which this trust is created, shall accrue and become due and payable by the Company, and shall not be otherwise satisfied and paid, the trustees shall have power to appropriate so much of the said trust property as may be necessary to the payment and satisfaction thereof, but no alleged debt or liability shall be so paid or satisfied unless and until the amount and validity of the said alleged debt or liability have been admitted by the Company, or until the validity and amount thereof have been established by the claimant in due course of law." Article Ninth of the trust deed describes the rights of the Insurance Company in the corpus of the trust:

"Ninth. After making due provision for the purposes aforesaid and subject to the provisions hereinbefore contained, the trustees shall stand possessed of the said trust fund, at the control and subject to the order of the Company, and shall and will use and dispose of the same as the Company may direct or appoint. But it is hereby expressly declared and provided, that until all the outstanding liabilities and obligations of the Company, absolute or contingent, to policy holders or creditors in the United States, are fully paid and discharged, the said trust fund or so much thereof as may be necessary to cover the outstanding liabilities, shall remain in the possession of the trustees, for the security and protection of the said policy holders and creditors, anything herein contained to the contrary notwithstanding."

The trustees are the claimants of about $4,000,000 of cash and securities. The cash is on deposit with Ladenburg, Thalman & Co. subject to the order of the trustees and the securities are in safe deposit boxes rented by the trustees of the National Park Bank.

Section 7 (*e*) of the Trading with the Enemy Act provides that: "If the President shall so require any money or other property * * * and rights and claims of every character and description owing or belonging to or held for, by, on account of or on behalf of, or for the benefit of an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act."

Both sides agree that Section 17 of the Trading with the Enemy Act which empowers this Court to issue such process as may be neces-

sary and proper to enforce the act affords ample jurisdiction to adjudicate the rights of the parties. The attempt of the Alien Property Custodian is not to try title but to obtain possession of the
151 cash and securities which are withheld after specific demand.

The libellant insists that Section 9 of the Act preserves all the substantive right of the claimants which the change of possession in no wise interferes with.

This section is as follows:

"Sec. 9. That any person, not an enemy, or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owners of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall
152 not so order within sixty days after the filing of such application, or if the claimant shall have filed the notes as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which a suit the Alien Property Custodian or the Treasurer of the United States, as the case may be shall be made a party defendant) to establish the interest, right, title or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian or in the treasury of the United States, as provided in this act, and until final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian, or Treasurer of the United States or order of the Court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminates."

"Except, as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process or execution or subject to any order of decree of any Court."

* * * * * * *

153 To safeguard persons who deliver property to the Alien Property Custodian Section (7*c*) provides that:

"Any payment * * * or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of the same."

I think the statute entitles the Alien Property Custodian to assert his possessory right and the trustees are given adequate protection under Section 9 of the Act. It is not necessary for me to go so far as to say that is a determination of this official upon undisputed facts were legally incorrect it would be enforced by the Courts merely because his investigation had been made in good faith. Here there can be no doubt that the property belongs to an enemy alien corporation subject to the lien of the trustees. The trust deed in this case created no more than a possessory lien without right on the part of the trustees to enforce it. The trustees hold the securities solely for convenience, because the creditors sought to be protected are contingent and numerous. The illustration of an agister's lien with no right except to hold is apposite. The rights to apply the property upon admission of indebtedness by the Company or after decree of Court are the rights of mere passive trustees or custodians.

Under such circumstances I think Section 8*a* of the statute by intendment cuts away from the trustees any power to resist this proceeding of the Alien Property Custodian to secure possession. As originally drafted Section 8 (*a*) provided:

"That any person not an enemy or ally or enemy holding a mortgage, pledge or lien on, or other right in the nature of security
154 in property of an enemy or ally or enemy, may, after default, dispose of such property under such rules and regulations and after such notice as the Secretary of Commerce shall prescribe; and such notice shall have in all respects the same force and effect as if duly served upon the enemy or ally of enemy personally" * * *

This clause was objectionable because departmental regulations were substituted for the method of liquidating ordinary liens afforded by state laws or the agreement of the parties and the section as finally enacted preserved the remedies of lienors but only in a limited class of cases where the "mortgage, pledge or lien or other right in the nature of security in property of an enemy or ally of enemy" was one "which by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand" (Section 8*a*). It is clear I think that no such mere right to hold as the trustees in the present case possessed was covered by the terms of this provision.

Disturbance of bank loans, secured by collateral, by any novel mode of liquidation and interference with foreclosure of ordinary mortgages might have seriously interfered with normal financial operations by American citizens. Consequently the Act was redrafted so as to allow such liens to be enforced in the customary way. No such reason existed for excepting a lien like the one under consideration and the failure to except it under familiar principles rendered the property subject to it liable to seizure as a part of the property of the alien enemy to which the Alien Property Custodian was given a right of possession by the statute. "Expressio minus exclusio alterious." United States vs. Arredondo, 6 Pet. at P. 725;
155 Stevens vs. Smith, 100 Wall., 321; Raleigh, etc., R. R. Co. vs. Reid, 13 Wall., 269; United States vs. County of Macon, 99 U. S., 582; Dewhurst vs. Feilden, 7 M. & G., 182. If the Custodian was not entitled to possession of pledged property not within this provision, what was the purpose of need of the provision?

After transfer there can be no doubt that the trustees may assert any rights they have under Section 9 of the Act to obtain such property as may be necessary to protect American creditors secured by the deed of trust. An adjudication by this Court goes no further than to award possession to the Alien Property Custodian subject to all adjusting rights which may be asserted under Section 9, supra.

The effect of my decision is to hold that the statute gives the right to the Alien Property Custodian to obtain possession of enemy owned property irrespective of the existence of liens thereon unless such liens may be disposed of on notice or presentation or demand. In enacting this statute under the War Power Congress doubtless realized the fact that much enemy owned property was subject to possessory liens of various kinds and that the Act would be quite ineffective if third persons, in many cases business associates of the enemy aliens, could indefinitely hold their property or compel a trial on the merits, before transfer of possession could be awarded. Consequently a right to retain possession was given only to those lienors whose business requirements naturally demanded it. Such persons as the trustees here are not of the prescribed class and consequently their right to retain possession as against the Alien Property Custodian must fail.

156 I may add that the facts here involved do not render the decisions in the cases of Salamander Insurance Co. vs. N. Y. Life Ins. & Trust Co., 254 Fed., 852; Keppleman vs. Keppleman, 105 Atl. Rep., 140, or American Exchange National Bank vs. Palmer (unreported) applicable to this case.

It is urged that the Alien Property Custodian must fail because the answer denies that he made any investigation. This denial is a mere conclusion in view of the further allegation that he knew all the facts which have been rehearsed above. Such complete and correct information was equivalent to and involved investigation. I think the allegations of the answer show not only that he must have made an investigation, but that he reached a right conclusion under the statute. He is therefore entitled to a decree on the pleadings awarding possession, which is granted accordingly.

July 29, 1919.

A. N. H.,
U. S. D. J.

157 *Decree.*

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, Held at the United States Court Rooms, in the City of New York, in the Said District, on the 6th day of October, in the year of our Lord one thousand nine hundred and nineteen.

Present:

Honorable August N. Hand, District Judge.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

This cause came on to be heard at this Term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz.:

That the libellant herein have judgment awarding to him the possession of the bonds, stocks and other securities described in Exhibit A annexed to the libel herein, to be by him held, administered and accounted for as Alien Property Custodian;

That the United States Marshal for the Southern District of New York deliver to the libellant as Alien Property Custodian the
158 bonds, stocks and other securities described in Exhibit A annexed to the libel herein and heretofore seized by him; and the libellant's costs having been duly taxed herein in the sum of $431.62, it is

Further Ordered, Adjudged and Decreed that the libellant recover of the claimants, J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as trustees, and of the Massachusetts Bonding and Insurance Company, the stipulator for costs herein, the sum of $431.62, as costs duly taxed and that execution issue therefor; it is

Further Ordered, Adjudged and Decreed that unless an appeal be taken from this decree on behalf of the claimants within the time fixed by the rules of this Court, the stipulator for costs on the part of the claimants shall cause the engagement of its stipulation to be performed or show cause within four days' time why judgment and execution shall not issue against it, its goods, chattels and accounts for the satisfaction of this decree; it is

Further Ordered, Adjudged and Decreed that all proceedings herein shall be without prejudice to the claimants or to any other persons with respect to any claims they may see fit to file with the Alien Property Custodian to Section 9 of the Trading with the Enemy Act, or any suit they may see fit to institute thereunder after the filing of their claim; it is

Further Ordered, Adjudged and Decreed that during ten
159 days from the date hereof and in the event an appeal shall

be taken from this decree within said time, pending said appeal, the libellant herein and the United States Marshal be and they hereby are stayed from taking any action in execution of this decree.

Enter.

AUGUSTUS N. HAND,
U. S. D. J.

Assignment of Errors.

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

Now come the Claimants in the above entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court and entered on the 6th day of October, 1919:

160 1. The Court erred in granting the motion of libellant for a decree on the pleadings.

2. The Court erred in not denying the motion of libellant for a decree on the pleadings.

3. The Court erred in not holding that the libel of information failed to state a cause of action upon the ground that it contained no allegation that the property libelled was money or other property or a right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President, within the meaning of Section 7-c of the Trading with the Enemy Act.

4. The Court erred in holding that the denial (contained in paragraph 2 of the answer) that the determination of the libellant was made after investigation was a denial of a conclusion.

5. The Court erred in not holding that the said denial (contained in paragraph 2 of the answer) that the determination of the libellant was made after investigation was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

6. The Court erred in holding that the denial (contained in paragraph 2 of the answer) that the determination of the libellant was made pursuant to the authority of the Trading with the Enemy Act was a denial of a conclusion.

7. The Court erred in not holding that the said denial (contained in paragraph 2 of the answer) that the determination of the libellant was made pursuant to the authority of the Trading with the
161 Enemy Act was a denial of an allegation essential to the libellant's cause of action and, therefore, a sufficient ground for denying a decree on the pleadings.

8. The Court erred in holding that the denial (contained in paragraph 3 of the answer) that the requirement of the libellant was made after investigation was a denial of a conclusion of law.

9. The Court erred in not holding that the said denial (contained in paragraph 3 of the answer) that the requirement of the libellant was made after investigations was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

10. The Court erred in not holding that paragraphs 1 to 8 inclusive of the answer contain denials of essential allegations of the complaint, and are therefore a sufficient ground for denying a decree on the pleadings.

11. The Court erred in holding that the allegations of paragraphs 9 to 40 inclusive of the answer did not set forth a sufficient affirmative defense to the libel.

12. The Court erred in failing to hold that the allegations of paragraphs 9 to 40 inclusive of the answer set forth a sufficient affirmative defense in that they affirmatively establish that the property libelled was not money or other property or a right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy
162 or ally of enemy not holding a license granted by the President, within the meaning of Section 7-c of the Trading with the Enemy Act.

13. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut as set forth in paragraphs 21 and 22 of the answer, did not constitute a sufficient affirmative defense to the libel herein.

14. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut as set forth in paragraphs 21 and 22 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40 inclusive of the answer, did not constitute a sufficient affirmative defense to the libel herein.

15. The Court erred in not holding that the determination contained in the demand of the Alien Property Custodian, dated October 28, 1908, a copy of which is annexed to the answer as Exhibit 4, which said demand is set forth in paragraph 24 of the answer, is inconsistent with the alleged later determination of the libellant upon which the libel is based, and precluded the said libellant from

validly making the determination set forth in paragraph 2 of the libel herein.

16. The Court erred in holding that the advice of counsel, as alleged in paragraph 27 of the answer, does not constitute a sufficient defense to the libel herein.

17. The Court erred in holding that the advice of counsel as alleged in paragraph 27 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9
163 to 40 inclusive of the answer, does not constitute a sufficient defense to the libel herein.

18. The Court erred in holding that the inquiry of the claimants of the Insurance Commissioner of the State of Connecticut, and the failure of the said Insurance Commissioner to reply thereto, as set forth in paragraph 28 of the answer, does not constitute a defense to the libel herein.

19. The Court erred in holding that the inquiry of the claimants of the Insurance Commissioner of the State of Connecticut, and the failure of the said Insurance Commissioner to reply thereto, as set forth in paragraph 28 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40 inclusive of the answer, does not constitute a defense to the libel herein.

20. The Court erred in not holding that in order to comply with the provisions of Section 7-c of the Trading with the Enemy Act requiring an investigation by the Alien Property Custodian, the Custodian must give notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

21. The Court erred in not holding that the Trading with the Enemy Act could not without contravening the due process clause of the Constitution, provide that the Custodian could determine that property is of an enemy character without giving notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

164 22. The Court erred in not holding that the allegations of paragraph 32 of the answer were a sufficient affirmative defense to the libel herein, on the ground that such allegations affirmatively show that libellant did not comply with the true intent and meaning of the provisions of Section 7-c of the Trading with the Enemy Act requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

23. The Court erred in not holding that the allegations of paragraph 32 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40 inclusive of the answer, were a sufficient affirmative defense to the libel herein, on the ground that such allegations affirmatively show that libellant did not comply with the true intent and meaning

of the provisions of Section 7-*c* of the Trading with the Enemy Act, requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

24. The Court erred in not holding that the alleged determination by the Alien Property Custodian was shown by the allegations of the answer to be arbitrary, in excess of the libellant's authority and without any evidence in its support, and hence insufficient to comply with the requirements of the Trading with the Enemy Act.

25. The Court erred in holding that the allegations of the answer showed that the Alien Property Custodian must have made such investigation as was contemplated by the Trading with the Enemy Act.

165 26. The Court erred in not holding that the investigation contemplated by Section 7-*c* of the Trading with the Enemy Act includes investigation not only of the questions of fact involved, but also of the questions of law involved, and that consequently the mere fact that the libellant is alleged to have known all the pertinent facts, does not show that he has made such investigations as is contemplated by Section 7-*c* of the Trading with the Enemy Act.

27. The Court erred in holding that in determining the sufficiency of the answer herein, the denials in the said answer could be deemed in any way controlled, qualified, modified or affected by any other allegations set up in the answer by way of an affirmative defense; and in particular erred in holding that the denial (contained in paragraphs 2 and 3 of the answer) that the libellant had made such investigation as was contemplated by Section 7-*c* of the Trading with the Enemy Act is in any way controlled, qualified, modified or affected by any of the allegations in the said answer by way of affirmative defense, or by any of the allegations contained in paragraphs 9 to 40 inclusive of the said answer, or in particular by any of the allegations contained in paragraphs 34 and 35 of said answer.

28. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction in that the said libellant had no jurisdiction of the property libelled because it was not money or other property or right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any
166 enemy or ally of *my* enemy not holding a license granted by the President.

29. The Court erred in not holding that the enemy interested in the property libelled herein was a beneficial interest in a trust within the meaning of the third paragraph of Section 7-*c* of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the provisions of the first paragraph of Section 7-*c* of the Trading with the Enemy Act.

30. The Court erred in not holding that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8-a of the Trading with the Enemy Act exclusively and not subject to the provisions of the first paragraph of Section 7-c of the said Act.

31. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the enemy interest in the property libelled herein was a beneficial interest in trust within the meaning of the Third paragraph of Section 7-c of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the provisions of the first paragraph of Section 7-c of the Trading with the Enemy Act.

167 32. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8-a of the Trading with the Enemy Act exclusively and not subject to the provisions of the first paragraph of Section 7-c of the said Act.

33. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38 was a defense to the libel herein.

34. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40 inclusive of the answer, was a defense to the libel herein.

35. The Court erred in not holding that the allegations of paragraphs 9 to 40 inclusive of the answer show that the libellant was acting not pursuant to the provisions of the Trading with the Enemy Act but outside of and in abuse of the authority given to him.

36. The Court erred in not holding that the determination of the libellant was the determination solely of a question of law, and, therefore, reviewable by the Court.

168 37. The Court erred in holding that this proceeding is a mere possessory proceeding and that it is not the province of the Court in such a proceeding to determine the ultimate rights and titles of the parties.

38. The Court erred in not holding that the relief and remedy referred to in the last paragraph of Section 7-c of the Trading with the Enemy Act contemplates and includes the right of a claim-

ant to property to have his right and title tried and adjudicated in a proceeding brought against him under Section 17 of the said Act; and that it is consequently the duty of the court in such a proceeding to adjudicate and determine the ultimate rights and titles of the parties, and, if it be found upon such adjudication that the property sought to be libelled is not of an enemy character to award the possession of such property to the parties entitled thereto.

39. The Court erred in holding that the rights of the claimants herein are those of mere passive trustees and custodiate.

40. The Court erred in not holding that the allegations of paragraphs 9 to 40 inclusive of the answer show that the claimants have title to the property libelled.

41. The Court erred in not holding that the Trading with the Enemy Act could not without contravening the due process clause of the Constitution, authorize that Alien Property Custodian to seize by judicial proceeding property not owing or belonging to or held for, by, on account of, or on behalf of, or for the
169 benefit of an enemy or ally of enemy.

Wherefore, the claimants pray that said decree be reversed and that said District Court for the Southern District of New York be ordered to enter a decree denying the libellant's motion for judgment on the pleadings.

ROOT, CLARK, BUCKNER & HOWLAND,
Solicitors for Claimants, J. Markham Marshall, Walter T. T. Rowe and Rudolf Metz, Trustees.

Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, New York City.

170 *Stipulation as to Record.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, *as* Alien Property Custodian, Libellant.
against
$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, November 24th, 1919.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Claimants-Appellants.
FRANCIS G. CAFFEY,
United States Attorney, Attorney for Libellant.

171 *Clerk's Certificate.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

627,000 PAR VALUE of CHESAPEAKE & OHIO 4½'s, CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify, that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 24th day of November, in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the said United States the One hundred and Forty-fourth.

ALEX. GILCHRIST, Jr.,
Clerk.

[SEAL.]

29448.

172 United States Circuit Court of Appeals for the Second Circuit, October Term, 1919.

Argued January 23, 1920. Decided March 3, 1920.

Appeals from the District Court of the United States for the Southern District of New York.

Before Ward, Hough and Manton, Circuit Judges.

No. 157-158-169-170.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

vs.

$20,000 PAR VALUE COLORADO & SOUTHERN FIRST MORTGAGE 4% BONDS, Maturing in 1929, and Other Property; Central Union Trust Company of New York, Individually and as Trustee under a Deed of Trust Made by Frankfort General Insurance Company, Claimant and Appellant.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

vs.

$100,000 PAR VALUE ST. PAUL, KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in 1941.

173 and Other Property: Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by Allianz Insurance Company, Claimants and Appellants.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee.

vs.

$50,000 PAR VALUE UNITED STATES GOVERNMENT 4% REGISTERED BONDS, Maturing in 1925, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee.

vs.

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

174 Francis G. Caffey, United States Attorney, for Libellant.

Perry D. Trafford for Claimants-Appellants Central Union Trust Co. and Edwin G. Merrill, et al.

Emory R. Buckner and H. H. Nordlinger for J. Markham Marshall, et al., Claimants-Appellants.

WARD, *C. J.*:

Connecticut and Massachusetts require, as do almost all the states, that insurance companies of foreign nations, before doing business in the state, shall deposit funds or securities for the protection of the company's policy holders and creditors in the United States. The exact terms of the statutes need not be stated.

The Munich Re-Insurance Company, a German corporation did deposit a quantity of securities with trustees in conformity with the law of the State of Connecticut.

The Frankfort General Insurance Company and the Allianz Insurance Company, both German Companies, deposited securities with trustees in conformity with the requirements of the law of Massachusetts.

It will not be necessary to set out the terms of the trusts at length; it is enough to say that although the income of the securities is payable to the Companies and they can withdraw them or any of them upon substituting others equally good, and can change the trustees, still the trustees hold the securities in trust to pay the claim of any policy holder or creditor admitted to be due by the Company or established by the claimaint in due course of law.

It is apparent that the trustees hold primarily for the benefit of the policy holders and creditors, and secondarily for the benefit of the Companies; but their duties are active, and they are not merely lien holders. The Companies cannot take the securities out
175 of their possession until the rights, absolute or contingent, of all policy holders and creditors in this country are secured, and in the meantime the trustees have the active duty of collecting and paying over the income, investing and reinvesting and paying claims properly proved.

The President, through the Secretary of the Treasury, issued licenses to the Companies in question, not to continue to do business in the United States, but for the purpose of being liquidated.

In November, 1918, the Alien Property Custodian filed libels of information in the District Court of the United States for the Southern District of New York against the securities in question alleging his demand for the same of the trustees and their refusal, and praying the Court to order the United States Marshal to seize the same and deliver them to him to be held and applied in accordance with law.

The Court made the decrees prayed for and the securities have been seized by the Marshal and delivered to the Alien Custodian; the trustees appeal.

We have no doubt of the right of the Alien Custodian to apply to the Court for aid; if he did not know where the securities were he would evidently be entitled to the aid of the Court to compel the trustees to discover and deliver them. In this case he did know where they were, but it was much more orderly and decent to obtain possession by the aid of the Court than to seize them by violence and the strong hand. Section 17 of the Act of October 6, 1917,

40 Statutes at Large, 411, known as the Trading with the Enemy Act, gives the Court full power in the premises:

"That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or
176 decree of such court as provided in Sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

The material parts of Section 7 (*c*) of the Act as amended November 4, 1918, 40 Statutes at Large, 1020, read:

"(*c*) If the President shall so require any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, the rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President, after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act." * * *

"The sole relief and remedy of any person having any claims to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." * * *

The constitutionality of the Act under the war powers of
177 Congress is admitted, the dispute between the parties being as to the construction of it.

The trustees-claimants contend that the Alien Custodian can seize only property belonging wholly to alien enemies; that he stands in their shoes and can get no more than they could themselves.

On the other hand, the Alien Custodian contends that, the President having delegated his authority to him under Section 5 of the Act, he can conclusively determine what property is liable to seizure as being that of an alien enemy.

We agree with the Alien Custodian, and cannot read the perfectly plain language of 7 (*c*) in any other way. As all the facts were known and undisputed they amounted to an investigation by the

Alien Custodian. If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under Section 9:

"That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States
178 or of the interest therein to which the President shall determine said claimant is entitled: Provided, however, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the Court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated * * *."

The Alien Custodian takes possession subject to the rights of innocent persons. Section 12, and amended March 28, 1918, 40 Statutes at Large, 460 provides:

179 "The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *"

It is obviously of the utmost importance that in time of war enemy property should be put into the possession of government; on the other hand, no great harm can come to the interests of innocent persons since the possession and management of the property by the Alien Custodian is under the control of the President by regulation and of the courts by decree. Policy holders or creditors may proceed to protect their rights under Section 9, or the trustees may do so for them.

We do not think that the trustees-claimants are mere lien holders under Section 8 of the Act and as such to be entitled to retain possession of the property in question; they are as stated above, trustees with active duties, and not lien holders within the meaning of the section at all. It clearly protects the lien holders and especially the vast amount of loans against collateral, any interference with which would cause great injury to banks, trust companies and stock brokers, and produce disturbance of business generally.

The decrees are affirmed.

Hough, C. J. concurs in result.

180 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms in the Post Office Building in the City of New York, on the 13th day of March, one thousand nine hundred and twenty.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

v.

$25,000 PAR VALUE CHESAPEAKE & OHIO 4½% CONVERTIBLE BONDS, Etc., and Other Securities; J. Markham Marshall et al., as Executors, etc., Claimants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed.

H. G. W.
C. M. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

181 [Endorsed:] United States Circuit Court of Appeals Second Circuit. F. P. Garvan v. $25,000 Bonds. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 16, 1920. William Parkin, Clerk.

182 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

Petition for Writ of Error.

To the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the Claimants-Appellants, by their attorneys, and complain that in the record of the proceedings and also in the rendition of the order for mandate of the United States Circuit Court of

Appeals for the Second Circuit, sitting in New York City, in the State of New York, in the above styled and numbered cause on the 16th day of March, A. D. 1920, affirming the decree of the United States District Court for the Southern District of New York in said cause, a manifest error has intervened to the great damage of the petitioners; that the jurisdiction of the District Court of the United States for the Southern District of New York in the said cause depended upon the fact that it arose under the laws of the United States, and that the case did not arise under the patent laws, under the trademark laws, under the copy-right laws, under the revenue laws, nor under the criminal laws of the United States, nor was the said case an admiralty case, nor was the cause one arising under

183 "An Act to establish a uniform system of bankruptcy throughout the United States," nor one arising under "An Act relating to the liability of common carriers by railroad to their employees in certain cases," nor one arising under "An Act to promote the safety of employees and travelers upon railroad- by limiting the hours of service of employees thereon," nor one arising under "An Act to promote the safety of employees and travelers upon railroad- by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," nor one arising under any amendment or supplement to any of the afore-mentioned Acts; that the amount involved in the case exceeds the sum of one thousand dollars ($1,000), besides costs, and that this is not a case where the judgments and decrees of the Circuit Court of Appeals is made final.

Wherefore petitioners pray for an allowance of the writ of error to the end that the cause may be carried to the Supreme Court of the United States, and the petitioners pray for such other process as is necessary to perfect the writ of error prayed for to the end that the error therein may be corrected.

Dated, May 24, 1920.

ROOT, CLARK, BUCKNER & HOWLAND.
Proctors for Claimants-Appellants.

Office & P. O. Address: 31 Nassau Street, Borough of Manhattan, New York, N. Y.

184 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against $25,000 Par Value Chesapeake & Ohio Railway, etc., J. Markham Marshall, et al., as Trustees, etc., Claimants-Appellants. Copy. Petition for Writ of Error. Root, Clark, Buckner & Howland, Proctors for Claimants-Appellants, 31 Nassau Street, Borough of Manhattan, New York City. Filed May 26, 1920.

185 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

Order Allowing Writ of Error.

The claimants-appellants having filed their petition for a writ of error from the Supreme Court of the United States to this Court, to review the order for mandate of this Court made and entered on March 16th, 1920, it is

Ordered that the said writ of error of said claimant-appellants to review said order for mandate, be, and the same is hereby allowed; and it is

Further ordered that the claimants-appellants file a bond in the sum of two hundred & fifty dollars on or before the 26th day of May, 1920, the same to act as a bond for costs.

Dated May 24, 1920.

H. G. WARD,
United States Circuit Judge.

186 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against $25,000 Par Value Chesapeake & Ohio Railway, etc., J. Markham Marshall, et al., as Trustees, etc., Claimants-Appellants. Copy. Order Allowing Writ of Error. Root, Clark, Buckner & Howland, Proctors for Claimants-Appellants. 31 Nassau Street, Borough of Manhattan, New York City. Filed May 26, 1920.

187 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

against

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% CONVERTIBLE BONDS, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

Assignment of Errors.

Now come the claimants in the above entitled cause and file the following Assignment of Errors, upon which they will rely upon

their prosecution of the appeal in the above entitled cause from the order for mandate of this Honorable Court, made and entered on March 16th, 1920.

1. The Court erred in affirming the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6th, 1919, granting the libellant a decree on the pleadings.

2. The Court erred in not reversing the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6th, 1919, granting the libellant a decree on the pleadings.

3. The Court erred in not holding that the libel of information failed to state a cause of action upon the ground that it contained no allegation that the property libelled was money or other property or a right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for
the benefit of an enemy or ally of enemy not holding a
188 • license granted by the President, within the meaning of Section 7*c* of the Trading with the Enemy Act.

4. The Court erred in holding that the knowledge by the libellant of all the facts was the equivalent to the investigation by him required by Section 7*c* of the Trading with the Enemy Act.

5. The Court erred in not holding that the denial (contained in paragraph 2 of the answer) that the determination of the libellant was made after investigation was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

6. The Court erred in not holding that the denial (contained in paragraph 2 of the answer) that the determination of the libellant was made pursuant to the authority of the Trading with the Enemy Act was a denial of an allegation essential to the libellant's cause of action, and therefore, a sufficient ground for denying a decree on the pleadings.

7. The Court erred in not holding that the denial (contained in paragraph 3 of the answer) that the requirement of the libellant was made after investigation was a denial of an allegation essential to the libellant's cause of action and, therefore, a sufficient ground for denying a decree on the pleadings.

8. The Court erred in not holding that paragraphs 1 to 8, inclusive, of the answer contain denials of essential allegations of the complaint, and are, therefore, a sufficient ground for denying a decree on the pleadings.

9. The Court erred in not holding that the allegations of
189 paragraphs 9 to 40, inclusive, of the answer set forth a sufficient affirmative defense to the libel.

10. The Court erred in failing to hold that the allegations of paragraphs 9 to 40, inclusive, of the answer set forth a sufficient affirmative defense in that they affirmatively establish that the property libelled was not money or other property or a right or claim of any character or description owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy nor holding a license granted by the President, within the meaning of Section 7*e* of the Trading with the Enemy Act.

11. The Court erred in refusing to hold that the Alien Property Custodian can seize only such interest in property as is vested in alien enemies; that he stands in their shoes and can get no more than they could themselves.

12. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut, as set forth in paragraphs 21 and 22 of the answer, did not constitute a sufficient affirmative defense to the libel herein.

13. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut, as set forth in paragraphs 21 and 22 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, did not constitute a sufficient affirmative defense to the libel herein.

14. The Court erred in not holding that the determination contained in the demand of the Alien Property Custodian dated October 28, 1918, a copy of which is annexed to the answer as Exhibit 4, which said demand is set forth in paragraph 24 of
190 the answer, is inconsistent with the alleged later determination of the libellant upon which the libel is based, and precluded the said libellant from validly making the determination set forth in paragraph 2 of the libel herein.

15. The Court erred in not holding that, in order to comply with the provisions of Section 7*e* of the Trading with the Enemy Act requiring an investigation by the Alien Property Custodian, the Custodian must give notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

16. The Court erred in not holding that the Trading with the Enemy Act could not, without contravening the due process clause of the Constitution, provide that the Custodian could determine that property is of an enemy character without giving notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

17. The Court erred in not holding that the allegations of paragraph 32 of the answer were a sufficient affirmative defense to the libel herein, on the ground that such allegations affirmatively show that libellant did not comply with the true intent and meaning of

the provisions of Section 7*c* of the Trading with the Enemy Act requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

18. The Court erred in not holding that the allegation of paragraph 32 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, were a sufficient affirmative defense to the libel herein, on the ground that such allegations affirmatively show that
191 libellant did not comply with the true intent and meaning of the provisions of Section 7*c* of the Trading with the Enemy Act requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

19. The Court erred in not holding that the alleged determination by the Alien Property Custodian was shown by the allegations of the answer to be arbitrary, in excess of the libellant's authority and without any evidence in its support, and hence insufficient to comply with the requirements of the Trading with the Enemy Act.

20. The Court erred in holding that the allegations of the answer showed that the Alien Property Custodian must have made such investigation as was contemplated by the Trading with the Enemy Act.

21. The Court erred in not holding that the investigation contemplated by Section 7*c* of the Trading with the Enemy Act includes investigation not only of the questions of fact involved, but also of the questions of law involved, and that consequently the mere fact that the libellant is alleged to have known all the pertinent facts does not show that he has made such investigation as is contemplated by Section 7*c* of the Trading with the Enemy Act.

22. The Court erred in holding that in determining the sufficiency of the answer herein the denials in the said answer could be deemed in any way controlled, qualified, modified or affected by any other allegations set up in the answer by way of an affirmative defense; and in particular erred in holding that the denial (contained in paragraphs 2 and 3 of the answer) that the
192 libellant had made such investigation as was contemplated by Section 7*c* of the Trading with the Enemy Act is in any way controlled, modified or affected by any of the allegations in the said answer by way of affirmative defense, or by any of the allegations contained in paragraphs 9 to 40, inclusive, of the said answer, or in particular by way of the allegations contained in paragraphs 34 and 35 of said answer.

23. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction in that the said libellant had no jurisdiction of the property libelled because it was not money or other property or right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, any enemy or ally of enemy not holding a license granted by the President.

24. The Court erred in not holding that the enemy interest in the property libelled herein was a beneficial interest in a trust within the meaning of the third paragraph of Section 7*c* of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the provisions of the first paragraph of Section 7*c* of the Trading with the Enemy Act.

25. The Court erred in not holding that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8*a* of the Trading with the Enemy Act exclusively, and not subject to the provisions of the first paragraph of Section 7*c* of the said Act.

193 26. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the enemy interest in the property libelled herein was a beneficial interest in trust within the meaning of the third paragraph of Section 7*c* of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the provisions of the first paragraph of Section 7*c* of the Trading with the Enemy Act.

27. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8*a* of the Trading with the Enemy Act exclusively, and not subject to the provisions of the first paragraph of Section 7*c* of the said Act.

28. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38 was a defense to the libel herein.

29. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, was a defense to the libel herein.

194 30. The Court erred in not holding that the allegations of paragraphs 9 to 40, inclusive, of the answer, show that the libellant was acting, not pursuant to the provisions of the Trading with the Enemy Act, but outside of and in abuse of the authority given to him.

31. The Court erred in not holding that the determination of the libellant was the determination solely of a question of law, and, therefore, reviewable by the Court.

32. The Court erred in holding that the determination of the Alie Property Custodian upon the undisputed facts of this case was co clusive upon the Court.

33. The Court erred in not holding that it was its function in th present proceeding to determine the ultimate rights and titles of th parties.

34. The Court erred in not holding that the relief and remedy r ferred to in the last paragraph of Section 7c of the Trading wi the Enemy Act contemplates and includes the right of a claiman to property to have his right and title tried and adjudicated in proceeding brought against him under Section 17 of the said Act and that it is consequently the duty of the Court in such a proceedin to adjudicate and determine the ultimate rights and titles of th parties, and, if it be found upon such adjudication that the proper sought to be libelled is not of an enemy character, to award th possession of such property to the parties entitled thereto.

35. The Court erred in not holding that the allegations of par graphs 9 to 40, inclusive, of the answer show that the claiman have title to the property libelled.

196 36. The Court erred in not holding that the Trading wi the Enemy Act could not, without contravening the due pro ess clause of the Constitution, authorize the Alien Property Custodia to seize by judicial proceeding property not owing or belonging t or held for, by, on account of, or on behalf of, or for the benefit of a enemy or ally of enemy.

Wherefore, the claimants pray that the said order for mandat as well as the decree of the District Court, be reversed and that th said Circuit Court of Appeals for the Second Circuit be ordered t enter a decree reversing the decree of the District Court of the Unit States for the Southern District of New York, granting the libellan motion for a decree on the pleadings.

ROOT, CLARK, BUCKNER & HOWLAND,
Proctors for Claimants J. Markham Marshall, Walter T. Rowe and Rudolf Metz, as Trustees, etc.

Office & P. O. Address, 31 Nassau Street, Borough of Manhatta New York, N. Y.

196 United States Circuit Court of Appeals for the Second C cuit. Francis P. Garvan, as Alien Property Custodian, Li lant-Appellee, against $25,000 Par Value Chesapeake & Ohio Ra way, etc. J. Markham Marshall, et al., as Trustees, etc., Claiman Appellants. Copy. Assignment of Errors. Root, Clark, Buckner Howland, Proctors for Claimants-Appellants, 31 Nassau stre Borough of Manhattan, New York City. Filed May 26, 1920.

197 New York Office, 16 Liberty Street.

United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

against

TWENTY-FIVE THOUSAND DOLLARS PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½ Convertible Bonds, and Other Bonds, Stocks, and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolph Metz, as Trustees, etc., Claimant-Appellant.

Know all men by these presents, That we, J. Markham Marshall, Walter T. Rosen, and Rudolph Metz, as Trustees, etc., as principals and Massachusetts Bonding and Insurance Company, a corporation organized and existing under and by virtue of the Laws of the Commonwealth of Massachusetts and having an office and place of business at 16 Liberty Street, Borough of Manhattan, City, County and State of New York, as surety are held and firmly bound unto Francis P. Garvan, as Alien Property Custodian in the sum of Two Hundred Fifty and 00/100 ($250.) Dollars, to be paid to the said Francis P. Garvan, as Alien Property Custodian, for the payment of which, well and truly to be made, the said principals and surety bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our Seals and dated the 27th day of May, 1920.

Whereas, the above named J. Markham Marshall, Walter T. Rosen and Rudolph Metz, as Trustees, etc., have prosecuted a writ of error to the Supreme Court of the United States to reverse the order made in the above entitled suit by the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such that the above named J. Markham Marshall, Walter T. Rosen and Rudolph Metz, as Trustees, etc., shall prosecute their writ to effect and, if they fail to make their plea good, shall answer all costs then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WALTER T. ROSEN,
RUDOLPH METZ,
J. MARKHAM MARSHALL,
As Trustees.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
[SEAL.] By HARVEY SELF,
Resident Secretary.

Attest:
EDWARD J. HALLIGAN,
Attorney in Fact.

198 Justification or Acknowledgment Federal Business.

Surety Department.

Massachusetts Bonding and Insurance Company,

Home Office, Boston, Massachusetts.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Personally appeared before me, Harvey Self, on this 25th day of May, one thousand nine hundred and twenty, known to me to be the Resident Secretary of Massachusetts Bonding and Insurance Company, the Corporation described in and which executed the annexed bond of J. Markham Marshall, et al., as surety thereon, and who being by me duly sworn deposes and says that he resides in the city of New York in the State of New York; that he is the Resident Secretary of said Massachusetts Bonding and Insurance Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the Commonwealth of Massachusetts; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of J. Markham Marshall, et al., is the corporate seal of said Massachusetts Bonding and Insurance Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Resident Secretary of said Company; and that he is acquainted with Edward J. Halligan and knows him to be the Attorney-in-fact of said Company; and that the signature of said Edward J. Halligan subscribed to said bond is in the genuine handwriting of said Edward J. Halligan and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of One Million and 00/100 Dollars.

Deponent further says that George B. Covington, residing at New York, in the State of New York, has been duly appointed as the agent of said Company to accept service of process against said Company in the judicial district wherein this bond is given and is authorized to enter an appearance in behalf of said Company in any action, suit, or proceeding brought against it in said judicial district.

HARVEY SELF.

Sworn to, acknowledged before me, and subscribed in my presence this 25th day of May, 1920.

[SEAL.] CATHERINE J. WALL,
Notary Public.

199 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against Twenty-five Thousand Par Value Chesapeake & Ohio Railway 4½% Convertible Bond- and Other Bonds, Stocks, and Other Securities; J. Markham Marshall, Walter T. Rosen, and Rudolph Metz, as Trustees, etc., Claimants and Appellants. Bond. Surety Massachusetts Bonding and Insurance Company, 84 William Street, New York City. Approved as to Form and Sufficiency of Surety. Date May 25, 1920. H. G. Ward, U. S. C. J. Filed May 26, 1920.

200 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 199 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Francis P. Garvan, as Alien Property Custodian, against $25,000 Par Value Chesapeake & Ohio Railway 4½% Convertible Bonds, etc., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of June in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

201 Supreme Court of the United States.

J. MARKHAM MARSHALL, WALTER T. ROSEN and RUDOLF METZ, as Trustees under a Certain Deed of Trust, Plaintiffs in Error,

against

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of Appeals of the United States for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States Circuit

Court of Appeals, before you, or some of you, in an action entitled Garvan v. $25,000 par value bonds, etc., between Francis P. Garvan, as Alien Property Custodian, libellant-appellee, and J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees under a certain Deed of Trust, claimants-appellants, a manifest error hath happened, to the great damage of the said J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees under the said Deed of Trust, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days

202 from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 24th day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

203 [Endorsed:] Supreme Court of the United States. J. Markham Marshall, et al., as Trustees under a certain Deed of Trust, Plaintiffs in Error, against Francis P. Garvan, as Alien Property Custodian, Defendant in Error. Writ of Error. Root, Clark, Buckner & Howland, Attorneys for Plaintiffs in Error, 31 Nassau Street, Borough of Manhattan, New York City. A copy of the within paper has been this day received at this office. May 24, 1920. Francis G. Caffey, U. S. Attorney, United States Circuit Court of Appeals, Second Circuit. Filed May 26, 1920. William Parkin, Clerk.

204 Supreme Court of the United States.

J. MARKHAM MARSHALL, WALTER T. ROSEN and RUDOLF METZ, as Trustees under a Certain Deed of Trust, Plaintiffs in Error,

against

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.

Citation.

By the Honorable One of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Francis P. Garvan, as Alien Property Custodian, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on the 22nd day of June A. D., 1920, pursuant to an order allowing a writ of error, filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, to review an order for mandate, signed, filed and entered on the 16th day of March, 1920, in that certain suit entitled Garvan v. $25,000 par value bonds, etc., wherein J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees under a certain Deed of Trust, are Claimants-Appellants, and you are Libellant-Appellee, to show cause, if any *they* be, why the order and decree rendered against the said claimants-appellants as in said order allowing a writ of error mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

205 Given under my hand at the Borough of Manhattan, in the City of New York, in the Southern District of New York, Second Circuit, this 24th day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-*third*.

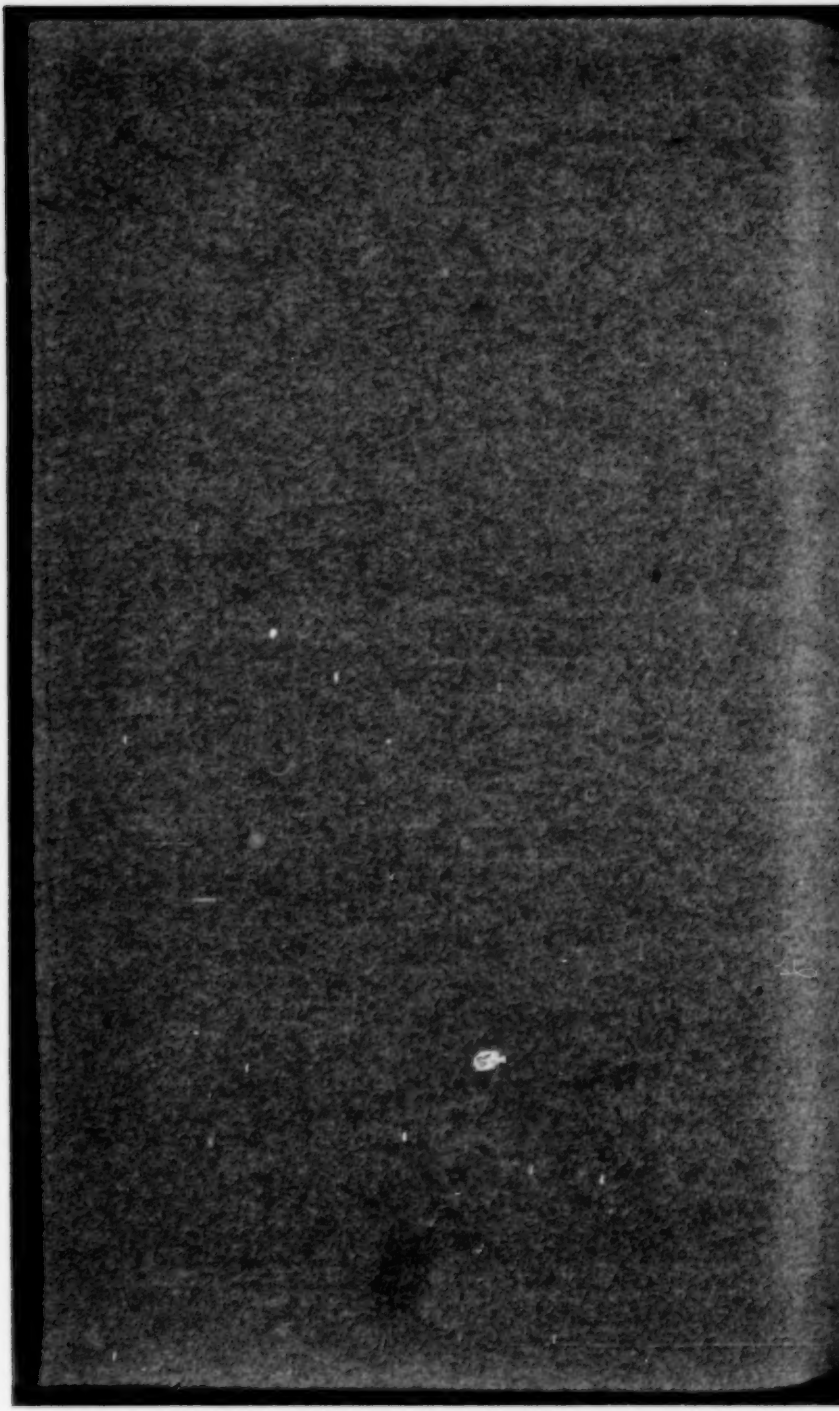
H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

206 [Endorsed:] Supreme Court of the United States. J. Markham Marshall, et al., as Trustees under a certain Deed of Trust, Plaintiffs in Error, against Francis P. Garvan, as Alien Property Custodian, Defendant in Error. Citation. Root, Clark, Buckner & Howland, Attorneys for Plaintiffs in Error. 31 Nassau Street, Borough of Manhattan, New York City. A copy of the within paper has been this day received at this office. May 24,

1920. Francis G. Caffey, U. S. Attorney. United States Circuit Court of Appeals, Second Circuit. Filed May 26, 1920. William Parkin, Clerk.

Endorsed on cover: File No. 27,752. U. S. Circuit Court Appeals, 2d Circuit. Term No. 395. J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as trustees, &c., plaintiffs in error, vs. Francis P. Garvan, as alien property custodian. Filed June 14th, 1920. File No. 27,752.

[redacted]



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Argued by

EMORY R. BUCKNER.

Supreme Court of the United States

OCTOBER TERM, 1920.

J. MARKHAM MARSHALL, WALTER T. ROSEN, and RUDOLPH METZ, as Trustees, &c.,
Plaintiffs in Error,

against

FRANCIS P. GARVAN, as Alien Property Custodian,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Two Cases. Nos. 394 and 395.

BRIEF FOR PLAINTIFFS IN ERROR.

Introduction.

These two cases involve the construction of those sections of the Trading with the Enemy Act which relate to enemy property in the United States, and

raise some fundamental questions as to the power conferred upon the President and the Alien Property Custodian by that Act.

The questions are not raised by alien enemies, or by anyone acting either directly or indirectly in their behalf. Plaintiffs in error in this case are American citizens, against whom no suspicion of disloyalty has been raised. In these cases, moreover, they are asserting rights not in their own personal interest, but as trustees appointed under a statute of the State of Connecticut, for the benefit of a large number of American holders of insurance policies upon whose just rights they believe the Alien Property Custodian is encroaching.

Statement.

Francis P. Garvan, as Alien Property Custodian, the defendant in error (hereinafter referred to as the libellant) brought libels of information against certain securities. Two separate libels were brought (respectively Nos. 394 and 395 here), relating to different securities, but involving identical facts. The pleadings and other proceedings in the two cases are substantially identical and the same questions of law are involved in both.*

J. Markham Marshall and others, as trustees, the plaintiffs in error (hereinafter referred to as the claimants) appeared, made claim to the securities seized, and filed an answer. The District Court granted the libellant judgment *on the pleadings*, without taking any evidence, and this judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. The claimants thereupon sued out

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* All page references herein will be to the Transcript of Record in No. 394.

the present writ of error, the case not being one in which the judgment of the Circuit Court of Appeals is made final. (Judicial Code, Secs. 128, 241, and Act of Jan. 28, 1915, c. 22, Sec. 4; Act of Sept. 6, 1916, c. 448, Sec. 3; *443 Cans of Egg Product v. United States*, 226 U. S., 172.) For the purpose of the judgment under review, and of the present writ of error, all the allegations of the answer are, of course, to be taken as true.

The Facts.

A Connecticut statute (General Statutes, Revision of 1902, Chapter 206, Title 25) requires all foreign fire insurance companies, before they may do business in the State, to deposit with the State Treasurer, or with the proper officer of some other State, at least $200,000 worth of securities in trust for the benefit of its policyholders in the United States (Sec. 3519). It furthermore provides that no single risk may be insured against for more than 10 per cent. of the company's capital (Sec. 3524). Capital, for this purpose, is defined as the deposits under Section 3519, plus sums loaned on American real estate or other authorized investments, "provided such real estate securities and assets shall be held in the United States by trustees who are citizens of the United States approved by the Insurance Commissioner for the benefit of all its policyholders and creditors in the United States" (Sec. 3521). There are certain deductions not here material.

The statute applies only to alien insurance companies, not to companies which are "foreign" only in the sense that they are organized in another State

of the United States. It was passed in recognition of the fact that policyholders in alien insurance companies were subjected to unusual hazards, and needed especial protection. The statute provides that "no policy issued by such company to any citizen of this State shall be invalidated by the occurrence of hostilities between the Government of the United States and the government under the laws of which it was organized," thus showing that the protection of policyholders in time of war was one of the purposes the Legislature had in mind, and that without doubt the trustees were required to be American citizens in order to prevent a possible disturbance of the fund in the event of war with the country to which the company belonged.

To comply with this law, the Munich Re-Insurance Company, a Bavarian corporation, on March 13, 1911, executed a deed of trust, under which the securities here concerned were delivered to Ernest Thalmann, Isaac N. Seligmann and Hermann Sielcken, all American citizens, in trust, to satisfy the purposes of the Act (Answer, par. 14, p. 15). The claimants, also American citizens, are their successors as trustees (Answer, par. 14, p. 15).

Into the detailed provision of this trust agreement it is not now necessary to go. The instrument itself is in the Transcript of Record (p. 23), and we shall discuss its proper interpretation in a later portion of this brief. It is enough to say at this point that the instrument, while giving to the company a certain measure of control over the fund, specifically provides that until all the liabilities to creditors and policyholders in the United States are discharged, the trust fund, or enough thereof to cover all outstanding liabilities, shall remain in

the possession of the trustees "for the security and protection of the said policyholders, anything herein contained to the contrary notwithstanding," and requires the trustees to satisfy out of the fund any liabilities of the company established by due course of law or admitted by the company.

Subsection c of Section 7 of the Trading with the Enemy Act of October 6, 1917 (40 Stat., 411, 418), provided that:

> "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Purporting to act under this authority, the Alien Property Custodian, on October 31, 1918, served on the Assistant Secretary of the Munich Re-Insurance Company, a "demand," dated October 28, 1918, addressed "To Carl Schreiner, Manager, and Walter T. Rosen, Rudolph Metz, and J. Markham Marshall, Trustees of and for the Munich Re-Insurance Company." (See text Transcript, 30.) It recited that "I, A. Mitchell Palmer, • • • after investigation do determine" that the Munich Re-Insurance Company is an enemy; that "you do have and hold in your custody or under your control" under a deed of trust "certain securities or other properties of the said Munich Re-Insurance Company, the value of which securities or properties exceeds the amount presently required by the

terms and conditions of such deed of trust. * * *" The paper served then demands "that such securities or properties in excess of the amount required for the purposes of such trust shall be by you transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me held, administered, and accounted for as provided by law."

The trustees, confronted with a possible conflict between their duties as trustees and the desires of the Government, consulted counsel, and were advised that under the Connecticut statute and the Deed of Trust it was their duty to retain possession of all the trust property; that the demand of the Alien Property Custodian was in excess of his authority; and that they would be exposed to liability to policyholders and creditors if they delivered any securities in compliance with the demand (Opinion of Elihu Root, Transcript, p. 32).

In the meantime another demand was served, dated November 18, 1918, of similar tenor, addressed to the same persons and in addition to the Superintendents of Insurance of New York and of Ohio "and to all persons to whom this may concern" (Transcript, p. 31).

On November 4, 1918, Section 7c of the Act was amended to authorize not merely a "requirement" that the described property be conveyed, transferred, etc., but an actual seizure of the property. On February 12, 1919, the Alien Property Custodian served a new "demand," addressed solely to the three trustees, containing annexed thereto a complete schedule of the securities held by the trustees, and reciting that "I, A. Mitchell Palmer, * * * have determined heretofore and do hereby determine" that the property scheduled "belongs to and is held for, by, on account of, on behalf of or for

the benefit of the Munich Re-Insurance Company," and that:

> "As such Alien Property Custodian I do seize such property and do require of you jointly and of each of you severally that the said property shall be transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me held, administered and accounted for as provided by law."
>
> (Transcript, p. 38.)

On March 7, 1919, a demand was served on Ladenburg, Thalmann & Co., in whose custody the securities involved in No. 394 were, and a similar demand on the National Park Bank, which held the securities involved in No. 395. These "demands" were similar in form to the demand served on the trustees, and likewise recited that

> "As such Alien Property Custodian I do seize such property and do require of you jointly and of each of you severally that the said property shall be transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me held, administered and accounted for as provided by law."
>
> (Transcript, p. 40; Transcript in No. 395, p. 43.)

No actual delivery took place as a result of any of these "demands."

Acting under Section 17 of the Trading with the Enemy Act (Libel, par. 6, p. 6), conferring on the courts jurisdiction "to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may

be necessary and proper in the premises to enforce the provision of this Act," the Alien Property Custodian filed his "libel of information," verified March 8, 1919, in the District Court for the Southern District of New York (Libel, p. 5). The libel alleged (par. 2, p. 5) that the petitioner "did, on the 7th day of March, 1919, after investigation, determine" that the Munich Re-Insurance Company was an unlicensed enemy, and that he further determined that the property specified in an annexed schedule "belonged to and [was] owned by the said Munich Re-Insurance Company, and was held for, by, on account of, or for the benefit of, the said Munich Re-Insurance Company by Ladenburg, Thalmann & Co., a partnership * * *." The libel alleged a demand on Ladenburg, Thalmann & Co., and a refusal to comply (pars. 3-4, pp. 5-6), and prayed for an order directing the Marshal to seize the securities and for an order citing all claimants to show cause "why the possession of said securities should not be delivered by the Marshal to the libellant to be by the libellant held, administered and accounted for as Alien Property Custodian according to the law and for such other order or relief in the premises as to the Court shall seem just" (p. 6).

By order of the court entered on the same day, and pursuant to a monition issued on March 10th, the Marshal "attached" the securities by exhibiting the monition to a member of Ladenburg, Thalmann & Co. (pp. 7-9).

On March 22nd, 1919, the trustees, plaintiffs in error in this Court, filed their claim in the District Court, alleging that they were "the true and bona fide owners of the said bonds, stocks and other se-

curities" (p. 10), and on April 19th filed their answer (pp. 11 *et seq.*).

The answer set forth the relevant portions of the Connecticut statute, the execution and text of the trust agreement, and the transfer of the securities to the trustees pursuant thereto (pars. 9-10, pp. 12-14). It alleged that claims of policyholders against the Munich Re-Insurance Company exceeding $100,000 had accrued and had been presented for payment (par. 18, p. 16), and that under agreements, treaties and contracts of re-insurance in force risks were insured against "far in excess of the total value of the said cash and securities so held by the said trustees and that the claims arising under such agreements, treaties and contracts, which have accrued or which may accrue and become and be enforceable in favor of persons within the United States against said Munich Re-Insurance Company and thus entitled to the security of the said trust funds may aggregate an amount equal to or in excess of the total value of all the said trust funds, including the securities libelled in this proceeding" (par. 19, p. 17).

The answer sets forth the successive demands on the trustees by the Alien Property Custodian, and the legal advice received by them (pars. 23, 24, 26, 29, pp. 18-19). It alleges that "all the facts with respect to the securities herein libelled and the trust deed under which the said securities were held by the claimant trustees were and are undisputed and were and are known to the said Alien Property Custodian" (par. 35, p. 21), so that the determination of the Alien Property Custodian that the property "was held for, by, on account of, or for the benefit of" the enemy company was a determination of law only.

The Issues Involved.

The question now before the Court is whether upon the facts admitted by the motion for judgment on the pleadings, and under the constitutional and statutory provisions applicable, the Alien Property Custodian was entitled to the possession of the securities held by the trustees under the declaration of trust.

The substantive issues in the case are relatively simple. There is first an issue as to the nature of the trust set up under the Connecticut statute. The Alien Property Custodian contends that substantially the property is owned by the enemy company; that the trustees, as representatives of the policyholders, have no more than a bare possessory lien, without power of disposition; and that therefore the Alien Property Custodian was right in fact and law when he determined that the property was owned by and held for an enemy, and demanded that it be transferred to him. The claimants, on the other hand, contend that the statute and declaration of trust created a real, active trust, vesting title in the trustees, and imposing upon them active duties toward their American policyholders, duties which required the trustees to hold the property not for and on behalf of the insurance company, but for and on behalf of the American policyholders, and in important respects adversely to the German company.

The second substantive issue is as to the nature of the interest which under the statute the Alien Property Custodian is authorized to take over. The claimants contend that as a matter of substantive

law the Trading with the Enemy Act gives the Alien Property Custodian the right to seize or demand possession only of the enemy's interest in the property, and not of the property itself. They do not deny his right by appropriate proceedings to take over all of the enemy's interest in the trust *res*, but they do deny his right to take the *res* itself, thus divesting American citizens of substantial property rights and substituting a right of action of perhaps doubtful value. They do not claim that he was without power in the premises to reach the interest of the enemy, but they do contend that he mistook his remedy.

These are the substantive issues involved. At the threshold of the case, however, lies the contention of the libellants that, however cogent may be the arguments of claimants upon these issues, they cannot be listened to in the present proceeding. The contention is that this is not an action to try any question of title, but merely to determine the right to possession; that the right to possession does not depend upon the existence of enemy ownership, but merely upon the Custodian's "determination" that the property is owned by or held for an enemy; and that any person who disputes this "determination" cannot resist the taking of possession, but can assert his rights only under Section 9 of the Trading with the Enemy Act. The jurisdictional prerequisite of a seizure, in other words, is said to be not enemy ownership, but a "determination" of enemy ownership, and such a "determination" is said to give rise at once not only to the right to take possession, but to the right to invoke the aid of the courts in securing possession.

This argument necessarily goes further. In the present case there are no disputed facts. The facts are all admitted by the motion for judgment on the pleadings, and it is in the same way admitted that the facts are undisputed (Answer, par. 35, p. 21), and that they were known to the Alien Property Custodian when he made the "determination" (Answer, pars. 34, 35, pp. 20, 21). The argument must therefore be that as far at least as the right to possession is concerned, the "determination" is binding on the courts, although the admitted facts show that it was erroneous in law.

The contention is far-reaching. If it has any validity, it must go to the point of holding that when he exercises his right to seize, the Alien Property Custodian is so far independent of the courts of the United States, and so far emancipated from the wholesome legal restraints heretofore thrown about administrative action, that he can himself declare and interpret the law under which he acts, define his own jurisdiction, and set up for himself an original system of jurisprudence, and that no court may call a halt on his activities. No injunction can issue against him, however illegal the threatened seizure; no suit for damages will lie, however arbitrarily he may have acted; and the courts themselves, sworn to obey the Constitution and laws of the United States, must nevertheless unquestioningly lend their aid in executing his illegal orders whenever he may call upon them for assistance.

As against this sweeping claim of unrestrained power, claimants offer an interpretation of the statute more in harmony with constitutional principles. In the course of this brief, we will endeavor

to show that the taking over of enemy property by the Alien Property Custodian, whether by seizure or compulsory conveyance, purports to confer on the Custodian not merely possession, but title, and to divest the owner of substantial property rights. It is an act of present confiscation, with not even a suggestion of compensation and not more than a bare hint of possible restitution in the distant future. We will show that, even in time of war, it would be beyond the power of Congress to make the decision of an administrative agency, declaring such a forfeiture, conclusive as to the law as well as to the facts, and that Congress, in the statute in question, attempted no such departure from sound constitutional principles. The construction of the act which we will offer, as an alternative to that urged by the libellants, rests upon the simple language of the statute. We claim that only property which is in fact owned by or held for an enemy can be demanded or seized by the Custodian, and that whether or not it is so owned or held is a judicial question upon which the Custodian's determination cannot be conclusive. If his demand is resisted by a claimant, the Custodian has his remedy by filing a libel in court, as he has done in this case, and securing a judicial determination of this right to the property. If he believes the resistance not only unfounded, but made in bad faith, he can secure an indictment of the contumacious holder under the criminal sections of the Act. But once he has submitted to the court, either by indictment or libel, his right to seize or demand the property, it is the court's duty under the Constitution as well as under the statute to determine whether property belongs within the class of property which under the Act the Custodian is empowered to take over.

Assignment of Errors.

1. The Court erred in affirming the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6th, 1919, granting the libellant a decree on the pleadings.

2. The Court erred in not reversing the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6th, 1919, granting the libellant a decree on the pleadings.

3. The Court erred in not holding that the libel of information failed to state a cause of action upon the ground that it contained no allegation that the property libelled was money or other property or a right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President, within the meaning of Section 7c of the Trading with the Enemy Act.

4. The Court erred in holding that the knowledge by the libellant of all the facts was the equivalent to the investigation by him required by Section 7c of the Trading with the Enemy Act.

5. The Court erred in not holding that the denial (contained in par. 2 of the Answer) that the determination of the libellant was made after investigation was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

6. The Court erred in not holding that the denial (contained in par. 2 of the Answer) that the deter-

mination of the libellant was made pursuant to the authority of the Trading with the Enemy Act was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

7. The Court erred in not holding that the denial (contained in par. 3 of the Answer) that the requirement of the libellant was made after investigation was a denial of an allegation essential to the libellant's cause of action and therefore a sufficient ground for denying a decree on the pleadings.

8. The Court erred in not holding that paragraphs 1 to 8, inclusive, of the answer contain denials of essential allegations of the complaint and are therefore a sufficient ground for denying a decree on the pleadings.

9. The Court erred in not holding that the allegations of paragraphs 9 to 40, inclusive, of the answer set forth a sufficient affirmative defense to the libel.

10. The Court erred in failing to hold that the allegations of paragraphs 9 to 40, inclusive, of the answer set forth a sufficient affirmative defense in that they affirmatively establish that the property libelled was not money or other property or a right or claim of any character or description owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President within the meaning of Section 7c of the Trading with the Enemy Act.

11. The Court erred in refusing to hold that the Alien Property Custodian can seize only such in-

terest in property as is vested in alien enemies; that he stands in their shoes and can get no more than they could themselves.

12. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut, as set forth in paragraphs 21 and 22 of the answer, did not constitute a sufficient affirmative defense to the libel herein.

13. The Court erred in holding that the regulations of the Insurance Commissioner of the State of Connecticut, as set forth in paragraphs 21 and 22 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, did not constitute a sufficient affirmative defense to the libel herein.

14. The Court erred in not holding that the determination contained in the demand of the Alien Property Custodian, dated October 28, 1918, a copy of which is annexed to the answer as Exhibit 4, which said demand is set forth in paragraph 24 of the answer, is inconsistent with the alleged later determination of the libellant upon which the libel is based, and precluded the said libellant from validly making the determination set forth in paragraph 2 of the libel herein.

15. The Court erred in not holding that, in order to comply with the provisions of Section 7c of the Trading with the Enemy Act requiring an investigation by the Alien Property Custodian, the Custodian must give notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

16. The Court erred in not holding that the Trading with the Enemy Act could not, without con-

travening the due process clause of the Constitution, provide that the Custodian could determine that property is of an enemy character without giving notice of hearing to the parties in interest and an opportunity to such parties to defend and protect their rights.

17. The Court erred in not holding that the allegations of paragraph 32 of the answer were a sufficient affirmative defense to the libel herein on the ground that such allegations affirmatively show that libellant did not comply with the true intent and meaning of the provisions of Section 7c of the Trading with the Enemy Act requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

18. The Court erred in not holding that the allegation of paragraph 32 of the answer, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, were a sufficient affirmative defense to the libel herein, on the ground that such allegations affirmatively show that libellant did not comply with the true intent and meaning of the provisions of Section 7c of the Trading with the Enemy Act requiring investigation on his part as a condition precedent to a demand or requirement under the Act.

19. The Court erred in not holding that the alleged determination by the Alien Property Custodian was shown by the allegations of the answer to be arbitrary, in excess of the libellant's authority and without any evidence in its support, and hence insufficient to comply with the requirements of the Trading with the Enemy Act.

20. The Court erred in holding that the allegations of the answer showed that the Alien Property Custodian must have made such investigation as was contemplated by the Trading with the Enemy Act.

21. The Court erred in not holding that the investigation contemplated by Section 7c of the Trading with the Enemy Act includes investigation not only of the questions of fact involved, but also of the questions of law involved, and that consequently the mere fact that the libellant is alleged to have known all the pertinent facts does not show that he has made such investigation as is contemplated by Section 7c of the Trading with the Enemy Act.

22. The Court erred in holding that in determining the sufficiency of the answer herein the denials in the said answer could be deemed in any way controlled, qualified, modified or affected by any other allegations set up in the answer by way of an affirmative defense, and in particular erred in holding that the denial (contained in pars. 2 and 3 of the Answer) that the libellant had made such investigation as was contemplated by Section 7c of the Trading with the Enemy Act is in any way controlled, modified or affected by any of the allegations in the said answer by way of affirmative defense, or by any of the allegations contained in paragraphs 9 to 40, inclusive, of the said answer, or in particular by way of the allegations contained in paragraphs 34 and 35 of said answer.

23. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the said libel-

lant had no jurisdiction of the property libelled because it was not money or other property or right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, any enemy or ally of enemy not holding a license granted by the President.

24. The Court erred in not holding that the enemy interest in the property libelled herein was a beneficial interest in a trust within the meaning of the third paragraph of Section 7c of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the provisions of the first paragraph of Section 7c of the Trading with the Enemy Act.

25. The Court erred in not holding that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8a of the Trading with the Enemy Act exclusively, and not subject to the provisions of the first paragraph of Section 7c of the said Act.

26. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the enemy interest in the property libelled herein was a beneficial interest in trust within the meaning of the third paragraph of Section 7c of the Trading with the Enemy Act, and subject to the provisions of the said paragraph exclusively, and not subject to the

provisions of the first paragraph of Section 7c of the Trading with the Enemy Act.

27. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction, in that the property libelled was not subject to the jurisdiction of the libellant by reason of the fact that the property libelled herein was subject to a lawful mortgage, pledge or lien, or other right in the nature of a security in favor of a person not an enemy or ally of enemy, and hence subject to the provisions of Section 8a of the Trading with the Enemy Act exclusively, and not subject to the provisions of the first paragraph of Section 7c of the said Act.

28. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38 was a defense to the libel herein.

29. The Court erred in not holding that the suit in equity brought by the claimants as set forth in paragraphs 37 and 38, taken in connection with the other affirmative allegations contained in paragraphs 9 to 40, inclusive, of the answer, was a defense to the libel herein.

30. The Court erred in not holding that the allegations of paragraphs 9 to 40, inclusive, of the answer, show that the libellant was acting, not pursuant to the provisions of the Trading with the Enemy Act, but outside of and in abuse of the authority given to him.

31. The Court erred in not holding that the determination of the libellant was the determination solely of a question of law and, therefore, reviewable by the Court.

32. The Court erred in holding that the determination of the Alien Property Custodian upon the undisputed facts of this case was conclusive upon the Court.

33. The Court erred in not holding that it was its function in the present proceeding to determine the ultimate rights and titles of the parties.

34. The Court erred in not holding that the relief and remedy referred to in the last paragraph of Section 7c of the Trading with the Enemy Act contemplates and includes the right of a claimant to property to have his right and title tried and adjudicated in a proceeding brought against him under Section 17 of the said Act; and that it is consequently the duty of the Court in such a proceeding to adjudicate and determine the ultimate rights and titles of the parties, and, if it be found upon such adjudication that the property sought to be libelled is not of an enemy character, to award the possession of such property to the parties entitled thereto.

35. The Court erred in not holding that the allegations of paragraphs 9 to 40, inclusive, of the answer show that the claimants have title to the property libelled.

36. The Court erred in not holding that the Trading with the Enemy Act could not, without contravening the due process clause of the Constitution, authorize the Alien Property Custodian to seize by judicial proceeding property not owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy.

POINTS.

The points upon which claimants rest their argument are the following:

POINT I.

THE COURT MAY IN THIS PROCEEDING INQUIRE WHETHER THE PROPERTY LIBELLED BY THE ALIEN PROPERTY CUSTODIAN WAS OWING OR BELONGING TO OR HELD FOR, BY, ON ACCOUNT OF, OR ON BEHALF OF, OR FOR THE BENEFIT OF, AN ENEMY OR ALLY OF ENEMY, WITHIN THE MEANING OF SECTION 7c OF THE TRADING WITH THE ENEMY ACT.

POINT II.

THE PROPERTY LIBELLED IS NOT ENEMY PROPERTY. LEGAL TITLE TO IT IS VESTED IN AMERICAN TRUSTEES, FOR THE BENEFIT OF AMERICAN CREDITORS AND POLICYHOLDERS. IT IS THEREFORE NOT SUBJECT TO SEIZURE UNDER THE TRADING WITH THE ENEMY ACT.

POINT III.

AS A MATTER OF SUBSTANTIVE LAW, THE TRADING WITH THE ENEMY ACT ENTITLES THE ALIEN PROPERTY CUSTODIAN TO TAKE OVER ENEMY PROPERTY ONLY, AND HE ACQUIRES NO GREATER RIGHTS THAN THE ENEMY HAD.

POINT I.

The court may in this proceeding inquire whether the property libelled by the Alien Property Custodian was owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy, within the meaning of Section 7c of the Trading with the Enemy Act.

"The military forces," said Chief Justice Waite, in *Lamar v. Browne*, 92 U. S., 187, 196, "act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony. They occupy on land the same position that naval forces do at sea. Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the capture, in the appropriate tribunal established for that purpose."

Does the Trading with the Enemy Act confer on the Alien Property Custodian the same unrestrained power of provisional capture?

In determining the proper construction of the Trading with the Enemy Act, the decisions of the Supreme Court in cases arising under Civil War legislation are of the greatest importance. No less than three statutes affecting enemy property on land were enacted, each dealing with a different phase of the subject, and the decisions construing them point clearly to the constitutional principles and the rules of interpretation applicable in the case at bar. Some cases arising out of the War of 1812, and the Mexican War, furnish further material. In the light of these cases a closer examination will then be made of the present statute.

The Principles Established in the Previous Decisions of This Court.

Enemy property may be of three kinds: property subject to capture at sea; property subject to capture on land; and property which cannot be "captured" at all, but which may with proper legislative authority be confiscated by appropriate legal proceedings.

Enemy Property at Sea.

When enemy property found at sea is "captured" by naval forces, recognized rules of law govern the effect of the capture on title to the ship. Obviously the naval commander cannot hold a public hearing, receive evidence, and weigh the precedents before he executes a capture. He acts "upon appearances, not upon testimony" (*Lamar* v. *Browne, supra*). The seizure is merely provisional and does not purport to determine conclusively whether or not the property is to be condemned. The effect of the capture is therefore not to vest title in the captor or the captor's government, but merely to give the right to possession (*Manila Prize Cases*, 188 U. S., 254, 278). The captor, unless excused by military necessity, must bring the prize into port and himself institute proceedings in a competent prize court to secure an adjudication (*Jecker* v. *Montgomery*, 13 How., 498, 516). Upon condemnation, title vests in the captor, and this title is said to relate back to the time of seizure (*Manila Prize Cases, supra*). If the prize court finds that the vessel is not good prize, it awards restitution to the owners, and, if there was not probable cause for the capture, may award damages (*Jecker* v. *Montgom-*

cry, supra, p. 517). Such a decree establishes that title never left the owner.

The effect of capture and adjudication upon title is discussed by Chancellor Kent in his Commentaries:

> "When a prize is taken at sea, it must be brought with due care, into some convenient port, for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone. * * * But by the modern usage of nations, neither the twenty-four hours' possession, nor the bringing of the prize *infra praesidia,* is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor. * * *"
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> *Kent, Commentaries* (13th Ed.), Vol. I, pp. 101-102.

It is now the accepted rule, both in international law and under our Constitution, that the condemnation, to be effective, must be by a judicial tribunal, and that no administrative substitute can

take its place. Lord Stowell put the matter forcibly in *The Flad Oyen*, 1 C. Rob., 114, where a British vessel captured by a French privateer was condemned as prize by a French consul at Bergen:

> "It has frequently been said that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others, bringing *infra presidia*, is authority to convert the prize. I take that to be not quite correct; for I apprehend that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel."

And he concludes:

> "It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage upon the matter, and when I am told that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me that it is the duty of this court to reject such a sentence as inadmissable."

In *Sawyer v. Maine, etc., Insurance Co.* (12 Mass., 291) the question arose in an insurance case whether the decree of the Minister of Justice in Haiti, condemning the vessel for breach of blockade, was conclusive. It appeared that the master of the vessel, on entering Port au Prince, was seized and brought before the King, who informed him that he "wanted the provisions" contained in the cargo. The master objecting, he was carried before the "minister of justice so-called," who read him a sentence of condemnation of the vessel. The court rejected the decree, observing (p. 295):

> "Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance. For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry."

See also *The Siren* (Fed. Cas. 12,911) and the vigorous expression of the same principle by Justice Story in a case of attempted administrative forfeiture for violating revenue laws (*Bradstreet v. Neptune Insurance Company*, 3 Sumner, 600). Also the following from a note to the Chilian Minister, on April 11, 1885, by Secretary of State Bayard:

"The capture of the property having been made on the high seas, and no prize court having inquired into the authority of the captor, on the liability of the property under the public law to be seized, that act might in strictness be regarded as piratical in its character. By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation had thereon as prize in a court of admiralty, judging by the law of nations and treaties."

Moore's Digest, Vol. VII, p. 630.

This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. In *Jecker* v. *Montgomery*, 13 How., 498, it appeared that a vessel captured by naval forces for blockade running during the Mexican War, was brought into the occupied port of Monterey, and there, together with his cargo, "condemned as prize" by the chaplain of one of the war vessels, whom the American military commander, with the President's approval, had appointed "Alcalde of Monterey," and authorized to exercise admiralty jurisdiction in cases of capture. More than a year later claimants of the cargo filed a libel *in personam* against the captor, attacking the validity of the Monterey decree. A demurrer to the libel was overruled by the Circuit Court, and on appeal to the Supreme Court, the decision was affirmed. Chief Justice Taney, delivering the opinion of the court, said (p. 515):

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

"The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party."

Property Subject to Capture on Land.

As to property on land, a sharp distinction is drawn between property subject to "capture" and property subject to "confiscation."

While the Constitution gives to Congress power to "make rules concerning captures on land and water" (Art. 1, Sec. 8), it is of course clear that without any legislation the military forces in the field have the power to "capture" any property in the hands of the hostile forces, or used or intended to be used for hostile purposes.

> "In war, the capture of property in the hands of the enemy, used, or intended to be used, for hostile purposes, is allowed by all civilized nations, and this whether the ownership be public or private" (*Kirk* v. *Lynd*, 106 U. S., 315, 317).

There are only two requisites: First, that the property be used or intended for hostile purposes, or peculiarly adapted to hostile use; and, second, that it be captured in the course of military activities. The first requisite is illustrated by the leading case entitled *Mrs. Alexander's Cotton*, 2 Wall., 404, holding that because of its peculiar character as the staple product of the South and the foundation of the Confederate financial structure, and because it was used by the Confederate government as the means of financing the rebellion, cotton came within the category of property used to promote the cause of the enemy, and was subject to "capture" by military forces in the field. The second requisite is illustrated by *Planters' Bank* v. *Union Bank*, 16 Wall., 483. In that case, after the city of New Orleans had been held in quiet possession by the Union troops for fifteen months, General Banks issued an order requiring certain banks to pay over all money standing to the credit of any enemy person corporation, association or government. The defendant bank obeyed the order and

paid over money owing to the plaintiff. The plaintiff later sued the bank on the debt, and was allowed to recover, the purported "capture" being void. "The order," said the Supreme Court, "was no attempt to seize property *'flagrante bello,'* nor was it a seizure for immediate use of the enemy. It was simply an attempt to confiscate private property which, though it may be subject to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war" (p. 495).

It followed that the debt still belonged to the plaintiff, and the attempted seizure was no bar to his recovery.

The capture, "*flagrante bello*," of property used for hostile purposes has nothing to do with the ownership of the property. It may be captured whether it belongs to friend or foe, belligerent or neutral. Cotton found in the Confederate States owned by a British subject was held rightfully captured in *Young* v. *United States*, 97 U. S., 39: "All property within enemy territory is in law enemy property, just as all persons in the territory are enemies" (*ibid.*, p. 60). The only question is as to hostile use, and upon that question the decision of the military officer in the field is, of course, within wide limits final.

Capture by the military of property used for hostile purposes therefore involves no judicial question upon which the courts can act. It rests upon military necessity; it is a means of winning battles and defeating armies. Obviously no court would presume to substitute its judgment on a military question for the judgment of the commander in the field. Hence, it is not surprising that with respect to movables the act of capture, immediately and with-

out judicial proceedings, vests title in the government.

> "The rightful capture of movable property on land transfers the title to the government of the captor as soon as the capture is complete, and it is complete when reduced to 'firm possession.' There is no necessity for judicial condemnation. In this respect, captures on land differ from those on sea."
>
> *Young* v. *United States*, 97 U. S., 39, 60.

> "The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession. The absolute title to immovable public property owned by the enemy does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the treaty of peace or otherwise, the ownership is changed if the conquest is complete."
>
> *Kirk* v. *Lynd*, 106 U. S., 315, 317

It follows as a corollary that no one, not even a loyal citizen or neutral, has redress in the courts for an unauthorized capture, unless Congress, as a matter of grace, grants a remedy. To permit suit against the military officers would hamper their conduct of military operations (*Lamar* v. *Browne*, 92 U. S., 197). The Government cannot be sued without its consent, and if there is no consent, there is merely a wrong without a remedy. Even the general statute conferring jurisdiction on the Court of Claims over suits against the United States does not authorize relief, for the action for wrongful capture sounds in tort, and hence does

not come within the statute (*Young* v. *United States*, 97 U. S., 39; see *Hijo* v. *United States*, 194 U. S., 315).

In the Civil War, Congress granted such a remedy under specific limitations. The Act of March 12, 1863 (12 Stat., 820), called the Abandoned and Captured Property Act, authorized the appointment of Treasury agents with authority "to receive and collect all abandoned or captured property in any state or territory • • • designated as in insurrection • • •" (not including arms, munitions of war, ships, etc.). The agents were authorized to appropriate the property to public use upon due appraisement, or to sell it at auction. The Act then provided that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

This statute granted no right of capture that did not exist before it was enacted. It merely gave, as a matter of grace, a method of securing compensation to owners who could prove their loyalty, or that they had been pardoned. The theory of the statute was clearly stated in *United States* v. *Anderson*, 9 Wall., 56, 65:

> "During the progress of the war, it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people, and distinguished between property owned by them, and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But Congress did not think proper to do this. In a spirit of liberality it constituted the government a trustee for so much of this property as belonged to the faithful Southern people, and while directing that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in Court of Claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership."

This statute, be it noted, covered only property in enemy territory, and only property there abandoned by the owner, or captured by military forces. The term "captured property" was defined by a Treasury regulation to refer to property "which had been seized or taken from hostile possession by the military and naval forces of the United States." "This definition," said the Supreme Court, "must be taken as the interpretation practically given to the Act by the department of the government

charged with its execution; and we think it correct" (*United States* v. *Padelford*, 9 Wall., 531).

The net result, then, is as follows: Capture vested title in the Government. The Abandoned and Captured Property Act as of grace gave the loyal or pardoned owner compensation for the capture (or, as the matter is sometimes put, declared a trust in favor of the loyal or pardoned owner). In either event title to the specific property was completely in the Government from the outset, and no judicial proceedings were necessary to declare or confirm the title.

The Captured and Abandoned Property Act, as we have shown, covered only property taken by the military, in enemy territory, *flagrante bello*. Where property was used for hostile purposes under circumstances which did not render it liable to military seizure, a different statute applied.

The Confiscation Act of August 6, 1861 (12 Statutes at Large, 319), entitled "An Act to Confiscate Property Used for Insurrectionary Purposes," briefly paraphrased, provided that if any property is u[illegible] in aiding or promoting an insurrection (or acquired or sold with intent that it should be so used), "all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned." The statute then prescribes proceedings in condemnation in the district, circuit or admiralty court, as the case might be.

Although entitled an Act to Confiscate Property, this statute was nevertheless a regulation of the right of capture, since it covered only such property

as was used or intended to be used for hostile purposes. In *Kirk* v. *Lynd*, 106 U. S., 315, the statute was carefully considered.

"Express authority is vested in Congress by the Constitution," said the court, "to 'make rules concerning captures on land and water' (Art. 1, Sec. 8). The statute now in question is manifestly an exercise of that power. As was said by Mr. Justice STRONG, in *Miller* v. *United States*, 11 Wall., 268, 308, 'It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. It treated the property as the guilty subject.'"

Under this statute title passed by the act of capture, provided that the rightfulness of the capture was subsequently established by judicial proceedings instituted by the captor. Perhaps the correct technical statement would be that title passed at once, subject to defeasance if not confirmed by the court. The following extract from *Kirk* v. *Lynd* clearly states the net result (p. 317):

> "In war the capture of property in the hands of the enemy, used, or intended to be used, for hostile purposes, is allowed by all civilized nations, and this whether the ownership be public or private. The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession. The absolute title to immovable public property owned by the enemy does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the treaty of peace or otherwise,

the ownership is changed if the conquest is complete. In regulating the capture of private property devoted to the use of an insurrection against the authority of the United States, Congress has provided for a judicial inquiry into the facts and a sentence of condemnation before title can pass out of the owner. When the inquiry is had, and the necessary sentence pronounced by the appropriate judicial tribunal, the title passes by reason of the capture or conquest, the lawfulness of which has been established in an adversary proceeding against the property seized under the direction of the President, and subjected to the jurisdiction of the court designated by law for that purpose. The title acquired by the purchaser in this case was of that kind. The property bought had been seized under the authority of the statute as property used in aid of an insurrection against the United States with the consent of its owner. The fact of hostile use with the owner's consent was established, and the requisite sentence of judicial condemnation entered. In this way the title of the United States by capture was perfected. That title, as against the owner and his heirs, was the fee. The defendants below, who are the defendants in error here, have succeeded to that title."

PROPERTY SUBJECT TO CONFISCATION ON LAND.

The cases next to be considered fall into an entirely different category. They relate not to capture, but to confiscation; not to property taken *flagrante bello*, or by special legislative authority, because used for hostile purposes, but to property outside the field of hostilities, which it is desired to confiscate because of its enemy ownership.

Brown v. *United States,* 8 Cranch., 109, is the leading case. The American ship *Emolous,* under charter to a British company, was detained in New Bedford by the embargo. She discharged her cargo, and a part of it, some pine timber owned by a British citizen, was floated up a salt-water creek and secured by blocking off the entrance of the creek. A libel was filed in the admiralty court against the timber, on behalf of the United States and private captors, and an American citizen appeared as claimant under a purchase after the outbreak of war. The District Court dismissed the libel, but Justice STORY, at Circuit, reversed the sentence and condemned the timber as prize. On appeal, the sentence of the Circuit Court was reversed. In his opinion Chief Justice MARSHALL sustained fully the power of the Congress, by appropriate legislation, to provide for the confiscation of all enemy property found within the United States. But he held that the mere existence of war did not confer the power on the executive, and that special legislation was necessary to authorize seizure.

In the Civil War, this lack was supplied by the third of the Civil War statutes relating to enemy property.

The Act of July 12, 1862 (12 Statutes at Large, 589), was entitled "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other Purposes." The first four sections were criminal, and punished treason and the aiding of insurrection. Section 5 provided:

> "That, to insure the speedy termination of the present rebellion, it shall be the duty

> of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the Army of the United States, that is to say."

The statute then enumerates the guilty classes—officials, officers, etc., of Confederate States or of the Confederacy, and any person owning property *in a loyal state* who "shall hereafter assist and give aid and comfort to such rebellion." Section 6 provides a similar seizure and forfeiture of the property of any other person who has aided and abetted the rebellion, and who does not within sixty days after public warning and proclamation by the President return to his allegiance to the United States. Property so seized and condemned was to be devoted to public use or sold, and the proceeds so devoted. Section 7 then provided:

> "That to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings in rem shall be instituted in the name of the United States in any district court thereof * * * and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property and become the property of the United States. * * *"

This statute is sharply distinguished in the legal and constitutional theory upon which it is based, from either of the two acts previously considered.

The distinction between it and the Abandoned and Captured Property Act was clearly recognized by the Supreme Court. The Confiscation Act of 1862 conferred on the Government a right not previously existing. The Abandoned and Captured Property Act recognized an existing right in the Government, and conferred a remedy on certain persons injured thereby. "The one is penal, the other remedial; the one claims a right, the other concedes a privilege" (*United States* v. *Anderson*, 9 Wall., 564). The Abandoned and Captured Property Act covered only property in enemy territory, seized "*flagrante bello*" by the military authorities (*United States* v. *Padelford*, 9 Wall., 531; *Planters Bank* v. *Union Bank*, 16 Wall., 483). The Confiscation Act of 1862 covered only property in loyal States and did not authorize military seizure (*Planters Bank* v. *Union Bank*, *supra*). The underlying justification for the "captures" recognized by the Act of 1863 was immediate military necessity, whereas, as the Supreme Court said of the Act of 1862:

> "The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war" (*Miller* v. *United States*, 11 Wall., 268, 306).

This difference in purpose and scope points to the fundamental constitutional distinction between the two acts. The Abandoned and Captured Property Act recognized that title to hostile property

captured by the military vested forthwith in the United States. The Confiscation Law recognized that property not captured by the military, and not affected by hostile use, *could not be forfeited to the United States without legal proceedings.* A very significant passage in the opinion of the court in *United States* v. *Anderson*, 9 Wall., 56, makes the matter clear. After discussing the theory of court contrasted the Confiscation Act of 1862 (p. 66):

> "The confiscation law, however, was not intended to apply to a person occupying the status of this claimant. The purpose which Congress had in view in passing that law was very different from that which induced it, in the Captured and Abandoned Property Act, to extend a privilege to the loyal owner. The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, insofar as it claims the right to seize and condemn their property, as a punishment for their crimes, *recognizes that certain legal proceedings are necessary to do so.*" (Italics ours.)

Equally significant is the distinction drawn by the Supreme Court between the Confiscation Act of 1861 and the Confiscation Act of 1862. The Act of 1861, it will be recalled, was held to be an exercise of the constitutional right to make rules concerning captures and covered property which was itself affected with a hostile use. The Act of 1862 did not relate to captures at all. It was enacted under the general war powers of Congress, as a means of crippling the enemy financially and commercially, and forfeited the property because of the character and actions of the person owning it. The

opinion in *Kirk* v. *Lynd*, 106 U. S., 315, is illuminating upon this point. After discussing the Act of 1861, and pointing out that it was an exercise of the constitutional right to make rules concerning capture, the court continued (p. 319):

> "The Act of July 17, 1862, c. 95, proceeds upon an entirely different principle. That was, according to its title, 'An Act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels.' Its object was, not to authorize the capture of property used to promote an insurrection, but to confiscate the property of traitors. The seizure was to be made, not because the property was in law the offender, but because the owners were engaged in rebellion, and would not return to their allegiance to the United States. The object evidently was, not to make the property a lawful subject of capture and prize, as in the act of 1861, but to punish the owner for countenancing the rebellion."

This distinction again points to a fundamental difference in the effect of the two laws upon titles. We have seen that under the Act of 1861 title vested at once, upon seizure, subject to be divested only if not confirmed by subsequent judicial proceedings. But under the Act of 1862 the preliminary seizure neither conferred nor purported to confer any title. The Act of 1862, after authorizing the President to devote seized property or its proceeds to public use, expressly provided that "to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States," and it is only upon an ad-

judication that the property belonged to a person engaged in rebellion, or who had given aid or comfort thereto, that "the same shall be condemned as enemies' property and become the property of the United States."

The Supreme Court so construed the Act in *Bigelow v. Forrest*, 9 Wall., 339, 350:

> "That it was not intended the mere act of seizure should vest the property seized in the United States is plain from the provisions of the seventh section, which enacted that to secure the condemnation and sale of any such property, after the same shall have been seized, proceedings *in rem* should be instituted in a District Court. * * *"

Or, to quote again the passage in *United States v. Anderson*, 9 Wall., 56, 67:

> "The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, insofar as it claims the right to seize and condemn their property, as a punishment for their crimes, recognizes that certain legal proceedings are necessary to do so."

Obviously this distinction rests upon sound common sense. When a military commander finds property used for hostile purposes he must act at once. He may seize the property and send it behind the lines; or he may destroy it on the spot. He must do whatever his military judgment prompts. And his judgment in this respect cannot be hampered by doubts as to the legality of the capture, or by the fear of possible liability to the owner, either on his own part or on the part of his

government. But when a civil official finds enemy property within his own territory, or in a region peaceably and securely occupied, far from the field of battle and undisturbed by hostile elements, where is the necessity for so drastic a rule? If the property, even there, is used or intended for hostile purposes, it may, of course, be seized at once, and the person so using it may be held as a traitor. But where the only purpose is to cripple the enemy financially by confiscating his subjects' property, there is plenty of time for deliberate adjudication. There is no conceivable reason (aside from the natural impatience of executive officers with any judicial restraint upon their powers) why disputed questions of ownership should not be adjudicated, in an orderly way, before the seizure is complete. Custody of the property, throughout the proceedings, is in the court. Any decision may properly relate back to the date of capture. Every interest of the Government is fairly protected. And there are preserved to the owners of property the inestimable benefits of due process of law.

Interpretation of the Trading with the Enemy Act.

In the light of these decisions the relevant sections of the Trading with the Enemy Act will now be examined.

The vital portion of the statute, for the purposes of this case, is subsection c of Section 7. In the original Act, this subsection was as follows:

> "(c) If the President shall so require any money or other property owing or belonging to or held for, by, on account of, or on

behalf of, or for the benefit of an enemy or ally of an enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

The Deficiency Appropriation Act of November 4, 1918, added to the right to "require" a conveyance, transfer, etc., a right to seize ("or the same may be seized by the Alien Property Custodian"). This amendment was in effect when the securities involved in this case were "seized," and the libel filed. The amendment also amplified the definition of the word "property" in certain respects not here material, and added some paragraphs to be later considered.

What becomes of the property after it has been taken over by the Custodian is set forth in Section 12. As originally enacted, this section vested the Custodian with "all of the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this act," and gave the right to "manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights or of such persons as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

By the amendment of March 28, 1918, the Custodian's power over the property was greatly extended. Instead of a limited right to sell, when necessary to preserve the property, he was given an unlimited right to sell the property, for any purpose, at public sale or with the President's approval at private sale, and to "exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof." This unlimited power of sale applied not only to all property actually conveyed, transferred, assigned, delivered, or paid over to him, but to all property "which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him" under the Act.

The right of action given to non-enemy persons claiming title to or an interest in property taken over by the Custodian is contained in Section 9. As originally enacted, this section allowed non-enemy claimants to any interest, right or title to the property, or creditors of the enemy owner, to file claims before the Custodian, and on application the President, with the consent of the owner and all other claimants, could order "the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled." If the President does not so order within sixty days, or if no application is made, then the claimant can sue in the District Court, at any time before the expiration of six months after the end of the war, "to establish the interest, right,

title, or debt so claimed." After such a suit is commenced, the property must be retained in the custody of the Alien Property Custodian till final decree or until the suit is otherwise terminated. The section continues:

> "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to any lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

On July 11, 1919 (since the filing of the libel herein), the section was amended. The provision requiring the consent of the owner and of all claimants before any property could be delivered by the President, was stricken out. Other provisions relating to property of persons who were technical enemies by reason of residence in captured territory are not here material.

In the light of these statutory provisions, and of the principles drawn from the prior decisions of this court, we may now examine the argument by which it is sought to sustain the extraordinary proposition advanced by libellant, that the Alien Property Custodian may in the face of adverse claims take possession of any property which he "determines" to be owned or held for an enemy, and that neither the District Court nor this court can inquire whether the determination was correct. We will show, first, that the Act does not give to the Custodian a mere possessory right, but purports to confer absolute title to enemy property seized by him. We shall further show that since the seizure

purports to determine title, it is an act of confiscation, as to which the decision of the Alien Property Custodian could not be, and never was intended to be, conclusive upon the courts.

The Act Gives the Custodian More Than a Mere Possessory Right to Enemy Property Seized by Him.

The argument that the Custodian secures by seizure or "demand" a mere possessory right does not rest upon anything to be found in the present statute. It seems to rest entirely upon a supposed analogy between the Trading with the Enemy Act and the Civil War enemy property acts which we have previously analyzed, and as we will show, ignores fundamental differences between the text as well as the purpose of the laws.

It is first suggested that the Custodian has a right of provisional seizure analogous to the preliminary seizure contemplated in the Confiscation Act of 1862 (*see supra*, pp. 38 *et seq.*). It is said that the Act confers on the Custodian a mere provisional possession, which leaves all matters of title in abeyance, to be determined by appropriate judicial proceedings under Section 9, just as the Act of 1862 authorized a preliminary seizure by the President, leaving questions of title to be subsequently adjudicated. The only distinction is said to be the merely procedural one that under the Act of 1862 judicial proceedings were instituted by the Government, whereas under the Act of 1917 the claimant must take the initiative. From the supposed provisional and possessory character of the seizure, the conclusion is drawn that the seizure can be based upon a mere *ex parte* administrative

determination which cannot be reviewed by the courts.

This analogy, however, leaves out of view the different character of the possession contemplated by the two statutes. The Act of 1862 did grant a provisional right of seizure, but it conferred no rights upon the Government until adjudication. Title did not vest until sentence of condemnation, and it was not until condemnation that the property could be sold or even used by the Government (*supra*, p. 39). Perhaps in its original form Section 12 of the Trading with the Enemy Act gave some color to this analogy, since it gave the Custodian the right to sell merely in order to preserve the property, a power possessed by marshals, receivers in bankruptcy, carriers, ships' masters, and similar temporary custodians of property. But the amendment of March 28, 1918, gave at once an unlimited power of sale. Immediately upon seizure, indeed upon mere "requirement" that the property be transferred, the Custodian acquires at once the right to sell, for any reason satisfactory to himself, and to deal with the property "as though he were the absolute owner thereof." Such a right is not reconcilable with any theory of provisional custody.

On the contrary, the language of the statute makes it clear that the act of seizure, and indeed the mere demand, was intended to vest in the Custodian title to all the enemy interest in the property concerned. The property is to be "conveyed, transferred, assigned, delivered or paid over," words appropriate to a change of title, respectively, of realty, registered securities, choses in action, chattels and money. Under a clause added to Section

7c by the Act of November 4, where the property "required" or "seized" consists of shares of stock, the corporation must cancel the outstanding certificates and issue new certificates to the Custodian. Another paragraph in the same section provides that any "requirement" may be filed, registered or recorded "in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement * * *," such filing, registering or recording to "impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the alien property custodian so filed, registered, or recorded." The obvious purpose is to make it impossible for the former owner to transfer to a *bona fide* purchaser a title which might be held to override the title acquired by the Alien Property Custodian.

This is no mere custody or possession, but an absolute title, mitigated at best by an uncertain fiduciary obligation toward possible citizen claimants, and by a yet more uncertain and wholly contingent duty toward the enemy owners.

But the conclusive answer to this analogy is that the provisional seizure authorized in the Act of 1862 *was* open to collateral attack, and the determination upon which it was made was *not* binding on the courts. In *Day* v. *Micou*, 18 Wall., 156, 161, this appears clearly from the opinion of the Court. The Court referred to the provision in the Act authorizing the seizure of property belonging to certain classes of persons, and continued:

> "It was not *any* property in which the persons described in these two sections might

have an interest that was made subject to seizure, but it was *their* estate and property, *their* interest in it, whatever that interest might be. (Italics the Court's.) The act manifestly contemplated no seizure of anything more than that which belonged to the offending person, and the thing seized, or its proceeds, was by the fifth section directed to be applied for the use of the army of the United States. If now we proceed to the seventh section, it will appear plainly that only that which was seized, seized lawfully in accordance with the directions of the two preceding sections, was made the subject for condemnation and sale. That section commences thus: 'That to secure the condemnation and sale of *any such property*, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof, or in any Territorial Court, or in the United States District Court for the District of Columbia, within which the property *above described* or any part thereof may be found,' &c. What property is this thus brought within the jurisdiction of the District Court? *Beyond doubt the property which had been seized, that is, the estate and property of the offending person, and no other.* If it was a term, or an estate at will, or a life estate, or an estate in joint tenancy, or in common, whatever it was, it was the subject alike of seizure and of condemnation. It is true proceedings *in rem* were ordered to be instituted in the District Court, but the question remains, what was the *res* against which the proceedings were directed? The answer must be, that which was seized and brought within the jurisdiction of the Court. * * *"

There is no material difference between the text of the two statutes upon which a different construction of the Act of 1917 could be based.

Nor is there the slightest analogy between the right of seizure conferred on the Custodian and the rights of temporary possession conferred upon a naval commander by capture. The naval commander, like the military officer, must act at once, upon appearances; the Alien Property Custodian is under no such necessity. Moreover, the naval commander's right to possession is qualified by an absolute duty (which may yield only to imperious military necessity), to submit his rights to a court at the earliest possible opportunity. If he does not, he may lose the ship, even though the original capture was rightful. The Custodian is under no such duty of vindicating his right to possession after the property has been seized.

There is lacking, therefore, one of the most effective safeguards of the traditional law of war. It is no mere procedural accident which compels the captor of maritime property to take the initiative in submitting his case to a prize court, but a rule which gives substantial protection to innocent owners. It recognizes that an executive seizure is an extraordinary and drastic measure, which places upon the captor an affirmative duty to vindicate his action before a court of justice. The absence of such a safeguard argues strongly against the intention of Congress to confer upon the Custodian a right to take possession free from review by the courts.

The right in the claimant to institute a suit under Section 9 of the Trading with the Enemy Act is of slight value in comparison. The claim-

ant may be out of the country, perhaps in military or civil service in a distant part of the world. He may never hear of the seizure. If he does hear of it, he may be so inaccessible that months will elapse before he can even begin proceedings under Section 9. If he applies to the President for a return of the property, he must wait sixty days before he may file his suit. Under the statute as it stood at the time the libel was filed, and until July 11, 1919, the President could satisfy the claimant's demand only with the consent of the owner and of "all persons claiming any right, title, or interest therein." If the owner was resident in enemy territory, his consent could obviously not be obtained. And the clause requiring the consent of all claimants defies interpretation. If it means all persons who have already filed claims, it is a worthless protection to claimants, for it means that the first claimant to file his claim can get the property. If it means all persons who may possibly file claims in the future, it completely nullifies the President's authority, for he must wait till the Statute of Limitations has eliminated all claims. Since this proceeding commenced, the section has been amended to permit the President to deliver the property without getting anyone's consent. Obviously this only makes the claimant's position worse, for by the time he has learned of the seizure and filed his application the property may have been delivered to a person of no financial responsibility, over whom the Custodian retains no control, and who perhaps has already carried the property beyond the jurisdiction. And after such delivery the claimant has no redress against the Government, for there are no proceeds against which he can go.

In the meantime, moreover, the Custodian is free at any time to sell the property or otherwise dispose of it. However improvident or unfortunate the sale, the claimant's right is thereafter limited to the proceeds. In the present case the property happens to have a market, but in another case it might be a large industrial plant, or similar property which cannot be suddenly thrown on the market, especially in times of war, except at a severe sacrifice. *After suit is commenced*, it is true, a disposition of the property is restrained until final decree. But the Custodian need not wait until suit is brought. He may seize to-day and sell to-morrow. Until suit is commenced there is no restriction whatever upon the sale or other disposition of the property.

There is not the slightest intimation in the statute that the Alien Property Custodian is to be a mere temporary possessor of the property. He may exercise from the outset every substantial right of ownership, and has it within his power to completely deprive any claimant of redress.

The Custodian's Determination, Therefore, Cannot be Conclusive.

It being clearly the intention of Congress, then, to give to a seizure or "requirement" the effect of immediately bestowing on the Custodian full rights of ownership and free power of disposition, it follows that Congress cannot have intended to make the determination of the Alien Property Custodian that he has the right to seize conclusive upon the courts. Such an interpretation would render the Act clearly unconstitutional, for it would confiscate property without due process of law, and give

to the Custodian a share of the judicial power which under the Constitution can be lodged only in the courts. Upon the first point the dictum in *United States* v. *Anderson*, 9 Wall., 56, *supra*, p. 41, is squarely in point. The dictum was that whereas property used for hostile purposes, and captured *flagrante bello* by the military became at once the property of the Government, property outside the field of hostilities, seized merely because of its enemy ownership, could not be confiscated without proper legal proceedings. Upon the second point the decision in *Jecker* v. *Montgomery*, 13 How., 498, *supra*, p. 28, is conclusive. The decision was that the power to declare the confiscation of enemy property was a judicial function, and that an attempted administrative forfeiture was a mere nullity.

If the Trading with the Enemy Act had to do with property seized by the military authorities *flagrante bello*, there might be some force in libellant's contention. Title to the property seized would vest on capture, and redress to claimants, being entirely a matter of grace, would be limited to the proceedings authorized in Section 9. Although in the brief of libellants before the Circuit Court of Appeals it was said that "the nearest analogy in American or English legislative enactment" was the Captured and Abandoned Property Act of the Civil War period (which covered property captured by the military), it is apparent that there is not the slightest analogy between the two acts. The rule which authorizes the capture of property in such a way as to vest immediate title in the captor applies only to property used or intended to be used for hostile purposes, and seized by the military at the scene of hostilities. It has, as we have seen, noth-

ing to do with seizure in the belligerent's own territory, three thousand miles from the scene of hostilities, to which no suspicion of hostile use has ever attached (*supra*, pp. 37 *et seq.*).

Libellants have suggested as an analogy which might justify the right of administrative forfeiture which, in effect, they claim exists in the present case, the decisions holding that the assessment of a Federal tax cannot be hindered by injunction, and that even where a tax is erroneously assessed the taxpayer must pay the money and then seek his remedy by a suit against the tax collector (*Dodge* v. *Osborn*, 240 U. S., 118, and cases therein cited). There is no analogy between the cases. In the first place, all that the taxpayer gives up is money, and his right of recovery against the tax collector gives him (aside from the expense of litigation) the exact equivalent. Under the Trading with the Enemy Act the person against whom a demand is made is asked to give up tangible property, perhaps unique in character, and he gets in return only a right to recover against the proceeds of that property, or against a possibly insolvent or evanescent claimant, to whom the property has been delivered by the Custodian under Section 9. The tax cases are more nearly analogous to the cases under the right of eminent domain. It is settled that property may be taken over by eminent domain, without prior judicial proceedings, so long as certain and adequate provisions are made under which just compensation can be subsequently judicially determined (*Crozier* v. *Krupp*, 224 U. S., 290, 306). The reason is that these proceedings are not confiscatory, but give the owner a right to compensation which is the exact equivalent of the property taken.

Another suggested analogy is to the cases in which, consequent upon a transfer of large tracts of country from a foreign sovereign to the United States, Congress has placed upon private claimants the burden of establishing their titles by initiating litigation within a certain period (see *Bottiller* v. *Dominguez*, 130 U. S., 238; *Barker* v. *Harvey*, 181 U. S., 481; *Florida* v. *Furman*, 180 U. S., 402). This analogy, likewise, completely fails. In strict right the treaty by which the lands were conveyed might have vested title directly in the United States Government. If such a conveyance wronged private owners the wrong would be done by the granting nation, not by the United States. The treaty itself, it is true, or the policy of the United States, might impose on the Government a duty to respect these titles. "But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department" (*Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S., 80, 81). A claimant, under legislation of this character, was absolutely secure. He could be sure of getting his land by appropriate proceedings. He was in an entirely different position from the claimant under the Trading with the Enemy Act, who, if libellants' contention is sound, must as a result of an administrative determination, made without public notice or opportunity to be heard, surrender his property to a public official, and receive in return only a right to recover against the proceeds, if any, in the hands of the Government.

Murray's Lessee v. *Hoboken Land Co.*, 18 How., 272, in no way supports libellants' argument. On the contrary, it points the other way. There an administrative distraint was sustained, under a statute expressly authorizing it, against a collector of the customs, for a balance of account due the Government. The act was sustained because by immemorial custom this had been the accepted method of collecting public money from officials, both in England and the United States. This case is analogous in every respect to the tax cases above considered. They rest upon the narrow justification that collection of public revenue is an essential function which cannot be hampered by preliminary litigation. "It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. *Imperative necessity has forced a distinction between such claims and all others,* which has sometimes been carried out by summary methods of proceedings, sometimes by systems of fines and penalties, but always in some way observed and yielded to." (Italics ours.) (*Murray's Lessee* v. *Hoboken Land Co., supra,* p. 282.)

With respect to enemy property in the belligerant's own territory, on the other hand, there is neither imperative necessity nor accepted custom to support an administrative forfeiture. On the contrary, the custom of civilized nations for centuries and of this country since its foundation has been to confiscate such property, if at all, only by judicial proceedings.

There are, it is true, a great many instances in which this Court, either under express legislation or otherwise, has given a conclusive effect to administrative decisions affecting property rights. The whole development of modern administrative law in this country has moved in this direction, and we shall not attempt to deny that the development is sound in principle and highly beneficent in practice. It is not necessary to review the decisions; they are familiar to this Court. The exclusion or deportation of aliens (*United States* v. *Ju Toy*, 198 U. S., 253; *Low Wah Suey* v. *Backus*, 225 U. S., 460, and other cases there cited), the exclusion of persons afflicted with a loathsome disease (*Oceanic Navigation Co.* v. *Stranahan*, 214 U. S., 320), the exclusion of objectionable matter from the mails (*Public Clearing House* v. *Coyne*, 194 U. S., 497), the establishment of pure food standards (*Buttfield* v. *Stranahan*, 192 U. S., 470), the regulation of railroad rates (*Interstate Commerce Commission* v. *Union Pacific*, 222 U. S., 541), are only a few of the cases in which the principle has been applied. It is doubtful whether it is at all applicable to the present case. There is a generic difference between executive decisions made in the course of administration, which incidentally affect personal or property rights, and decisions made in proceedings whose only object is the confiscation of property because of the nationality or conduct of the owner.

Lawton v. *Steele*, 152 U. S., 133, illustrates this distinction. That case involved a New York statute aimed at the protection of fish and game which authorized certain officers to summarily destroy, without liability, fish nets set in violation of law. Three justices thought the statute unconstitutional,

because it confiscated property without a judicial hearing. The majority sustained the statute, on the narrow ground indicated in the following excerpt (p. 140):

> "It is not easy to draw the line between cases where property illegally used may be destroyed summarily, and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips and dice in a gambling room."

On the narrow ground that the nets in question cost only $15, and that it would cost more to condemn them than they were worth, the court sustained the Act. But it cited with apparent approval New York decisions holding unconstitutional a statute authorizing the seizure and sale without judicial proceedings of trespassing animals (*Rockwell* v. *Nearing*, 35 N. Y., 302). Other State de-

cisions are to the same effect (*Dunn* v. *Burleigh*, 62 Maine, 24; *Lowrie* v. *Bainwater*, 70 Mo., 152).

But even if this principle of administrative law were applicable to a seizure under the Trading with the Enemy Act, the principle itself contains limitations which render it clearly inapplicable to the case at bar. The first limitation is that the administrative official must act within the jurisdiction set out for him in the statute from which he derives his power. Where, for instance, a statute authorized the Land Office to issue patents to homestead entrants outside of city limits, a patent was void which was in fact within the limits of Minneapolis, although the Commissioner had determined that it was patentable (*Burfenning* v. *Chicago, etc., Railway*, 163 U. S., 321). The court said in this case, at page 323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. (Citing cases.)
>
> "But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings

> in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. *In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.*" (Citing cases.)

This limitation is alone fatal to any application of this principle to the case at bar. In the Trading with the Enemy Act the Custodian was authorized to seize property owing or belonging to or held for, by, on account of or on behalf of, or for the benefit of an enemy or ally of enemy. He had no right to seize property not so owing or so belonging or so held. And it is for the courts to hold him in check when he exceeds his statutory jurisdiction.

The Civil War Cases on This Point Are Controlling.

Cases under the Civil War Confiscation Act of 1862 afford a parallel so close as to be decisive upon this point. Under the interpretation put upon the Act by the Supreme Court, only the seizure and confiscation of the enemy's interest in property was authorized. Thus, in the case of land, only the life interest of the enemy could be forfeited and the rights of non-enemy mortgagees were likewise preserved. (See the cases discussed *infra*, pp. 124 *et seq.*). Cases arose, however, where the lower court, either through a misconception of the law or because no claimants appeared, purported to seize and confiscate not merely the enemy's interest, but the entire property. The argument was made there, as it is here, by the Alien Property Custodian, that even

though such a seizure and confiscation could be directly attacked by writ of error, it could not be collaterally questioned. The Supreme Court rejected the argument on the ground that the court had jurisdiction only over the enemy's interest in the property, and that its action with respect to non-enemy interests was a complete nullity, subject to collateral attack.

Thus in *Bigelow* v. *Forrest*, 9 Wall., 339, one Forrest, an enemy, held land in fee. It was libelled, and the order of condemnation purported to confiscate and sell "all the right, title and interest of the said French Forrest in and to the property." The heirs of Forrest brought ejectment against the purchasers and were allowed to recover. The court said (p. 351):

> "It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation in the District Court of the United States is conclusive that the entire right, title, interest, and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; *but under the Act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction.*"

In *Day* v. *Micou*, 18 Wall., 156, the decree of condemnation again purported to convey the whole title to land. A mortgagee, who had not appeared in the forfeiture proceedings, was permitted to as-

sert his title in an independent litigation and foreclose against the purchaser. The court pointed out (p. 161) that only the enemy's interest in the property could be seized under the Act; that only property rightfully seized could be condemned, and that only property which was condemned passed to the purchaser.

> "If, then, as we hold, the property and estate of J. P. Benjamin was all that was seized, or all that could be seized and condemned in these confiscation proceedings, those who held other interests in the land were not bound to come in and assert their claims" (p. 162).

See also Conrad v. *Waples*, 96 U. S., 279; *Burbank* v. *Conrad*, 96 U. S., 291; *Waples* v. *United States*, 110 U. S., 630; *Arcayo* v. *Schmidt*, 113 U. S., 293; *Sheilds* v. *Schiff*, 124 U. S., 351.

If under these statutes even the determination of a court that the property belonged to the persons specified in the Act was not conclusive, surely the act of a mere administrative officer, without judicial power, can have no higher dignity.

The second limitation is equally fatal in the present case. The administrative decision can be conclusive only upon a question of fact. Questions of law are open to review in the courts. When the mistake of law consists in an erroneous interpretation of the statute from which the official derives his power, it generally results in an excess of jurisdiction, thus rendering the first limitation also applicable.

The case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94, is a familiar and

leading case upon the subject under discussion. The complainants in that case had been subjected to a "fraud order" by the Postmaster General under a statute which authorized such action by the Postmaster General "upon evidence satisfactory to him." The delegation of administrative discretion is seen to be very broad. Complainants prayed an injunction against a local postmaster from executing the fraud order. The Government demurred. The Supreme Court overruled the demurrer because on the admitted facts the case was not one within the Postmaster General's jurisdiction, notwithstanding his assumption of it. The court said:

> "Conceding for the purpose of this case that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for

dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

"That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief" (pp. 107-108).

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief" (pp. 109-110).

Gegiow v. *Uhl*, 239 U. S., 3, is a similar case. Immigration officials had declined admission to certain aliens, on the ground that they were bound for a city in which the labor market was already overstocked and hence were likely to become a public charge. The court held that the decision that the men were likely to become a public charge, although in form one of fact, really depended upon an erroneous interpretation of the statute and therefore declined to treat the determination as conclusive.

See also

Interstate Commerce Commission v. *Louisville & Nashville*, 227 U. S., 88, 92.

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order (*Int. Com. Comm.* v. *Northern Pacific Ry.*, 216 U. S., 538, 544). In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc., Ry.*, 220 U. S., 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission."

It is unnecessary to cite any other authorities on this proposition. The point is so clear that we suppose it will hardly be contested.

CONGRESS DID NOT INTEND THE CUSTODIAN'S DETERMINATION TO BE CONCLUSIVE.

Returning, then, to the Trading with the Enemy Act, examination of the text will show that Congress had no such intention, in enacting the present law, as is attributed to them by appellees. As originally introduced in Congress, Section 7c read as follows:

> "If the Secretary of Commerce, by direction of the President, shall so require, any money or other property owing or belonging to an enemy or ally of enemy, *or* which the Secretary of Commerce after investigation, shall determine is owing to or belongs to an enemy or ally of enemy, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian, under such rules and regulations as the Secretary of Commerce shall prescribe." (Senate Committee Hearings, p. 13, line 18, to p. 14, line 1.)

Here the jurisdictional requirements were in the alternative. All property must be conveyed, transferred, etc., which *is* owing or belonging to an enemy, and also all property which the Secretary of Commerce *after investigation shall determine* to be owing or belonging to an enemy. But this draft was changed in committee, doubtless for the very reason that it might have been construed to give power to take over non-enemy property upon an erroneous determination that it was enemy owned. The section emerged from committee and was enacted in the following form:

> "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

How could Congress, without tedious circumlocution, have put more clearly its intention that the

jurisdiction of the Alien Property Custodian *depended upon the fact of enemy ownership?* If the property is not in fact owing to or belonging to or held for, etc., an enemy or ally of enemy, the President cannot require it to be conveyed, transferred, assigned or delivered. If he does purport to make such a requirement, the requirement is a nullity. The same is true of the right to seize under the amended Section 7c. Only property which is in fact enemy property can be seized. All other property is entirely beyond the scope of the Act.

The argument was made below that such an interpretation would render the words "which the President after investigation shall determine is so owing, or so belongs, or is so held," superfluous, since if the fact of enemy ownership exists, a determination of the fact adds nothing. It does, however, add a great deal. As a matter of practical administration Congress may have considered it of the greatest importance to require an investigation and determination before a demand could be made. If the clause above quoted were eliminated, what would be the effect? The Alien Property Custodian would habitually issue "requirements" upon mere suspicion, trusting to the owner to resist if he was not in fact an enemy or ally of enemy. Now to the average patriotic citizen who has not the advantage of legal advice, a demand from a government official, especially in war time, is a very terrifying thing. The mere thought of resistance conjures up a vision of military dungeons and execution at dawn. Congress undoubtedly realized that unless some restraint was put upon the right to "require," loyal and respectable citizens would be vexed by continuous demands based upon rumor

and suspicion, and large amounts of property would be turned over to the Custodian, *in terrorem,* or merely to avoid any appearance of opposition to the Government. Hence, it was carefully provided that there must be both the fact of enemy ownership and a determination of the fact, after investigation, before a demand could be made.

The converse of libellants' argument, however, undoubtedly is true. If the Alien Property Custodian's interpretation of the law is adopted, then the rest of the paragraph does become completely superfluous. If the "determination" is the only jurisdictional fact, and if this "determination" is conclusive, why did Congress say anything about the fact of enemy ownership? The "well established rule of construction that unless otherwise necessarily required, all of the words of a statute shall be given some force and meaning," to which the libellant appealed in his argument below, shows clearly that his construction of the section is erroneous.

If our interpretation of Section 7c is correct, it follows that the owner of property which the Alien Property Custodian is erroneously attempting to seize is not limited to the remedy conferred in Section 9. That remedy applies where property has rightfully come into the Custodian's possession. It applies, for instance, to property belonging to an enemy, but in which an American citizen has a mortgage interest, not entitling him to possession. In such a case the Custodian can take over all the enemy's interest in the property, including the right to possession, and the mortgagee can by suit under Section 9 obtain satisfaction out of the property. Perhaps if the alien enemy is a lessee or bailee for

a term, with the right of possession, the Custodian may take possession in the enemy's stead, and the owner, if not an enemy, may sue under Section 9 for his hire or rental, and for redelivery when the term expires. These questions are not now before the court. It is enough to say that there is plenty of scope for actions under the section with respect to property rightfully in the Custodian's possession. But where the property is not yet in the Custodian's possession, and where he has no right under the statute to take possession, surely owners of property can resist *in limine* the unauthorized encroachment, and need not allow their property to fall into the hands of an official who claims over it unlimited rights of ownership and disposition.

Nor is this view in conflict with the clause added to Section 7c by the Act of November 4, 1918, that "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian or required so to be, or seized by him shall be that provided by the terms of this Act." The clause plainly limits only the remedy available after the property has been effectually conveyed, transferred, assigned, delivered or paid over to the Custodian or after there has been an effective "requirement" or seizure. An example will illustrate the point. Property is owned by A, an American citizen, and is in his possession. The Alien Property Custodian erroneously determines that it belongs to B, an enemy. B believes himself to be the owner. B, pursuant to a demand, purports to convey title to the Custodian. The Custodian, claiming he secured title by the conveyance, demands that A

deliver up possession, and upon A's refusal libels the property, or brings replevin against A, under Section 17. Obviously A can defend on the ground that he is the true owner, and he is not limited to his rights under Section 9, because the property never has been conveyed, transferred, assigned, delivered or paid over to the Custodian. The situation would not be different if instead of securing the purported conveyance from B he merely "required" B to convey the property. The requirement would be ineffective, both because the property did not come within the Act, and because the person to whom the demand was addressed had no title to convey. Let us suppose, however, that the Custodian should actually seize the property. If the seizure was constructive (as in the case at bar), consisting merely of a notice of seizure, it would be ineffectual, for the property was not subject to seizure. It would be like a void attachment, utterly without effect. If the Custodian actually took forcible possession he would doubtless be personally liable for the trespass. In either case there would be no "seizure" or "requirement" within the meaning of the statute, but merely a personal unauthorized act of the individual who happened to occupy the office. The clause in Section 7c, therefore, would not apply.

The supposed case is like the one at bar. In this case the Custodian has made upon the claimants a "requirement" and has attempted to effect a constructive seizure which, as we shall show in the second part of this brief, were beyond his power under the statute. There has been, therefore, neither a "requirement" nor a seizure authorized by the Act. Consequently, by its very terms the

clause in Section 7c does not apply, and claimants are free to set up their defense wherever they have an opportunity.

The inapplicability of the clause of Section 7c as amended is further shown by the language of the clause. The defense of this proceeding and the appeal to this Court *are* relief or remedy expressly provided by the terms of the Act. Section 17, by providing for an appeal to this Court, expressly contemplates the right to defend a proceeding brought under its provisions—a right which in any event would necessarily be implied (*Windsor* v. *McVeigh*, 93 U. S., 274). The provision of Section 7c relied on by the Custodian does not provide that the sole relief and remedy shall be as provided by Section 9—it provides that the sole relief and remedy shall be "*that provided by the terms of this act.*" Section 17 is just as truly a part of the Act as Section 9; and the right of defense evidently contemplated by it, and the right of appeal expressly provided by it, *are* relief and remedy provided by the terms of the Act.

THE PURPOSE OF THE STATUTE DOES NOT REQUIRE A CONCLUSIVE ADMINISTRATIVE DETERMINATION.

The language of the statute, therefore, flatly belies the Alien Property Custodian's contention that he has a provisional right to seize any property which he determines to be enemy owned, and that this determination is binding on the courts both as to the facts and the law. Another strong argument against his proposed interpretation of the law is the complete absence of any necessity for the existence of such an extraordinary power. That a military or naval commander must have the

power in the course of hostilities to capture upon suspicion is undoubtedly true. In war time private rights must yield before the right of capture. But the Trading with the Enemy Act has nothing to do with capture. Its object, like that of the Act of 1862, was confiscation. It sought to weaken the enemy financially, and make his resources available to the United States in the prosecution of the war. There is no reason why this purpose cannot be effected, as we believe Congress intended it to be effected, through the orderly procedure of the courts.

Let us look at the matter in a practical light. The Alien Property Custodian has determined that certain tangible property is enemy owned, and makes a "requirement" that it be transferred to him. If it is in fact enemy owned, and someone who has power to do so transfers the property to him, well and good. He gets complete title, and claimants have their remedy under Section 9. If the owner is absent, or declines to deliver the property, the Custodian has other remedies. He can apply to the person in whose possession the property is, and demand a delivery, or make a seizure. If the property is, in fact, enemy owned, and if delivery is made, it may be assumed that for all practical purposes title passes, for we do not claim that the alien enemy could put forth any constitutional right to a judicial hearing. Hence neither he nor any person claiming under him could question the Alien Property Custodian's title. But let us suppose that there is an adverse claim. Either the person whom the Custodian has determined to be the owner claims that he is not an enemy, or some other non-enemy claims title and a right

to possession. The Custodian may, of course, make his constructive seizure, as he did in the case at bar, thus safeguarding his rights if the property proves in fact to be enemy owned. But in the face of an adverse claim of title and of a right to possession, it seems to us that his obvious duty, both under the Constitution and under the statute, is to immediately avail himself of the right accorded him under Section 17, to seek an adjudication of the disputed facts in the courts, either by a suit *in personam*, or, better still, by libelling the property *in rem*, and obtaining a judgment valid against the world. The procedure is simple and effective. A libel is filed, and a monition forthwith issues enjoining the Marshal to seize the property and bring it in the possession of the court. The Marshal serves the monition and makes his return, and from that moment the property is *in custodia legis*, and beyond the power of the owner. The seizure by the Marshal effects every purpose which could be accomplished by a delivery of possession to the Custodian, excepting only that the Marshal cannot sell the property (except for its preservation), cannot deliver it to claimants except pursuant to an adjudication of the court, and cannot divest or purport to divest the claimant's title without due process of law.

Any other course may result in the grossest acts of injustice, not only to loyal citizens of the United States and of allied nations, but to neutrals whose friendship in time of war may be of incalculable value.

Three cardinal principles of statutory construction, then, sustain the claimants' argument upon this point. The language of the statute is so clear

that even if it could be shown that the draftsmen had a different intention, it is doubtful whether such evidence could affect its construction (*Caminetti v. United States*, 242 U. S., 470). Any other construction than that which we urge would render the Act unconstitutional, or at least would raise doubtful question of constitutionality, which should strongly influence this court against any such construction (*United States v. Jin Fuey Moy*, 241 U. S., 394, 401; *Harriman v. Interstate Commerce Commission*, 211 U. S., 407). And it satisfies every legitimate governmental purpose expressed in the Act, while safeguarding fully the valuable private rights which the libellant's construction imperils.

We believe that the Alien Property Custodian himself acted upon this construction of the statute when he filed his libel in the present case. He had already made a "seizure." If his present contention is sound, that seizure already vested in him the complete title, giving him the right to sell the property, and to a purchaser the right to demand possession. But he realized that the adverse claims rendered his title doubtful, and he wished to have these claims adjudicated. Hence he filed his libel *in rem* against the property. If his only purpose had been to obtain provisional possession, a proceeding *in rem* would not have occurred to him. Replevin against the banking houses in whose custody the property was would have been the appropriate action. A proceeding *in rem* acts upon the property itself, and binds the whole world. It is the very proceeding authorized in the Confiscation Acts of 1861 and 1862 to secure an adjudication of title. And yet he now denies to this court the right to inquire into the very questions which are appropriately at issue in such a proceeding.

Having Invoked the Jurisdiction of the Court, Libellant Must Make Out a Case According to Law.

There is an additional reason, independent of any heretofore given, why in this proceeding the court can inquire whether the property was owned by or held for an enemy. Let us assume that the Custodian could have seized the property, upon his own determination of fact and law, and that his determination could not be attacked collaterally except in a suit under Section 9. In this case, however, the Custodian has himself come into court as a petitioner seeking relief. He has submitted his cause to the court. Having done so, he cannot now rely upon his own determination, but must make out a case according to law. The cases under the revenue laws are precisely in point. We have seen that, on account of the imperative need of a prompt collection of revenues, an administrative determination can place upon the taxpayer an immediate duty to pay the tax, even though he contests its validity, and that his redress is confined to a suit for restitution (*supra*, p. 56). But in these very cases it is settled that if the Government elects to come into court, the merits of the assessment are open to examination (*Clinkenbeard* v. *United States*, 21 Wall., 65; *United States* v. *Reading R. R.*, 123 U. S., 113; *DeBary* v. *Dunne*, 162 Fed., 961; *Freeman* v. *United States*, 157 Fed., 195; 168 Fed., 1022; *United States* v. *Nebraska Distilling Company*, 80 Fed., 285; *United States* v. *Bank of America*, 15 Fed., 730; *United States* v. *Myers*, 3 Hughes, 239; 27 Fed. Cas. No. 15,846).

The leading case of *Clinkenbeard* v. *United States* was an action brought to collect an inter-

nal revenue tax. The tax had been duly assessed by an assessor and no appeal had been taken. The defendant claimed, however, that he was not liable to the tax because of the fact that without his fault he had been unable to use his distillery, the statute providing that in such a case the tax should be abated.

Section 19 of the Act of July 13, 1866 (14 Stat., 132), provided:

> "That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of said Commissioner be had thereon * * *."

It was claimed in this case that the assessment of the collector was conclusive, although the assessment had been imposed while the distillery of the plaintiff was unavoidably closed through accident. This Court held that it was not, saying at pages 70-71:

> "Is he precluded by any general rule of law from setting up such a defense? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or certiorari, for setting it aside?
>
> "It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. *But if they assess persons, property or oper-*

> *ations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax,* however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. *When the government elects to resort to the aid of the courts it must abide by the legality of the tax."*

In *United States* v. *Reading R. R., supra,* the court said that it was well settled

> "that in an action to recover the tax the controlling question is not what has been assessed, but what is by law due" (p. 114).

In *Freeman* v. *United States, supra,* the court said at page 198:

> "The government has, in this instance, sought to collect the amount of taxes alleged to be due in a court of law, and in order to do so has instituted proceedings for that purpose. Under these circumstances it would be unprecedented to hold that, notwithstanding certain rights were conferred upon the distiller by the provisions of this statute, yet the surety when sued on his joint obligation with the distiller, should not be entitled to assert this right as a defense to the action instituted against him."

In *United States* v. *Bank of America, supra,* the court said at page 731:

> "When the Government elects to resort to the aid of the court, it must abide by the legality of the tax."

These cases govern the case at bar. It cannot be that when Congress gave to the courts, in Section 17, jurisdiction to make orders and decrees and to issue process "to enforce the provisions of this act," it intended the courts to be mere handmaidens of the Alien Property Custodian, bound at his beck and call to execute his orders without inquiring whether they were lawful or not. Congress does not hold the judicial function in such disrespect. The principle of the separation of powers has yielded somewhat, in recent years, to the necessities of administration, but we have not yet come to the point where Congress can compel the courts to execute administrative orders which on the undisputed facts they believe to be unlawful.

It is said that the principle of the *Clinkenbeard* case, if applied to the Trading with the Enemy Act, would encourage contumacy and disobedience, and place a man in a more favorable position, because of his resistance to the Government. The science of logic could hardly exhibit a more perfect example of question begging. It assumes the very point sought to be proved, namely, that the demand of the Alien Property Custodian was one which he had a right to make, and which ought to be obeyed. There is no public policy in favor of obedience to illegal orders. If the Alien Property Custodian overreached his jurisdiction, it is in the public interest that he be restrained. If the resistance is mistaken, if for example the property proves in fact to have been enemy owned, no harm is done to the Government, for its title will relate back to the date of seizure. If the resistance was contumacious and in bad faith, there can be a criminal indictment under Section 16 for a wilful vio-

lation of Section 7c, which requires enemy property to be surrendered on demand. It is an unheard of argument that a citizen should be foreclosed from resisting executive encroachments merely because such resistance puts upon the executive the burden of justifying his conduct in the very court of law to which he has appealed for assistance.

POINT II.

The property libelled is not enemy property. Legal title to it is vested in American trustees, for the benefit of American creditors and policyholders. It is therefore not subject to seizure under the Trading with the Enemy Act.

The question argued in our last point was the purely procedural one whether or not the Alien Property Custodian's determination is conclusive in the present proceeding. The remaining questions are questions of substantive law. The ultimate question of substantive law upon which the merits of the case turn is: Is the property libelled of the class which by the Trading with the Enemy Act is required to be delivered to the Alien Property Custodian? This question resolves itself into two questions: (1) What is the legal nature of the property sought to be seized? and (2) What property or rights or interests in property are vested by Trading with the Enemy Act in the Alien Property Custodian? These questions will be respectively discussed in this and in the succeeding point.

The Connecticut Statutes and the Provisions of the Deed of Trust.

The securities in question were deposited with the predecessors in title of the plaintiffs in error pursuant to certain Connecticut statutes already referred to (General Statutes of Connecticut, Revision of 1902, Secs. 3518 to 3525; now re-enacted as Secs. 4101 to 4108 in the Revision of 1918),

analogues of which exist in most of the States of the Union.*

These sections are printed *in extenso* as an appendix to this brief.**

As a condition of doing business in the State of Connecticut, these statutes require all "foreign insurance companies" (*i. e.*, insurance companies organized outside the United States, Secs. 3521 and 3522) to deposit at least $200,000 with the Treasurer of the State of Connecticut, or with the proper officer of some other State, "in trust for the benefit of its policyholders in the United States" (Sec. 3519). It being provided that no insurance company doing business in Connecticut shall take any risk greater than 10 per cent. of its capital (Secs.

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* Code of Alabama, Vol. II, Sec. 4563; Arizona Revised Stat. (1913), Civil Code, Sec. 3428; Digest of Stat. of Arkansas (Kirby & Castle, 1916), Sec. 5076; Revised Stat. of Colorado (1908), Sec. 3112; Meyers 1911 District of Columbia Code, Sec. 649; Parks Annotated Georgia Code (1914), Sec. 2419; Idaho 1913 Session Laws, Chap. 97, Sec. 14; IV Annotated Stat. of Illinois (Jones & Addington, 1913), Sec. 6621; 1 Kentucky Stat. (1915), Sec. 693; 2 Louisiana Stat. (Marr, 1915), Sec. 3585; Revised Stat. of Maine (1916), Sec. 106; Annotated Code of Maryland (1911), Art. 23, Sec. 157; 2 Revised Laws of Massachusetts, Chap. 118, Sec. 81; 2 Compiled Laws of Michigan (1915), Sec. 9191; General Stat. of Minnesota (1913), Sec. 3595; II Mississippi Code (1917), Sec. 5063; 2 Revised Stat. of Missouri (1909), Sec. 7018; Revised Code of Montana (1907), Sec. 4069; Revised Stat. of Nebraska (1913), Sec. 3174; 1 Revised Laws of Nevada, Sec. 1275; 1917 Session Laws of New Hampshire, Chap. 21, Sec. 1; 2 Compiled Stat. of New Jersey, p. 2856; Stat. of New Mexico, Sec. 2865; New York Laws 1909, Chap. 33, Sec. 28; 3 Pell's Revision, Gregory's Supp. 1914 (North Carolina), Sec. 4770a; 4 Annotated General Code of Ohio (1910), Sec. 9367; 1 Revised Laws of Oklahoma, Sec. 3423; 2 Lord's Oregon Laws, Sec. 4617; 5 Purdon's Digest (Pennsylvania), p. 6441; General Laws of Rhode Island, Revision of 1909, p. 761; 2 Compiled Laws of South Dakota, p. 168; III Compiled Stat. of Tennessee, Sec. 3292; III Civil Stat. of Texas (1914), Sec. 4870; Compiled Laws of Utah, Sec. 1144; General Laws of Vermont (1917), Sec. 5623; 1 Code of Virginia (1904), Sec. 1271b; II Codes & Stats. of Washington (Remington, 1915), Sec. 6059; 1 Hogg's West Virginia Code, Sec. 1395; Compiled Stat. Wyoming (1910), Sec. 4122.

** All references to such statutes in this brief will be to the section numbers in the Revision of 1902.

3500 and 3524), and the amount of capital being also important for certain other statutory purposes (see Secs. 3086, 4255), it is provided that for all purposes of the insurance laws of Connecticut the capital of every foreign insurance company shall be deemed to be all amounts deposited with the Connecticut State Treasurer or other State officer, as required by the section summarized above; together with all legal investments in the United States, provided such other investments "shall be held in the United States by trustees who are citizens of the United States approved by the insurance commissioner, for the benefit of all its policyholders and creditors in the United States" (Sec. 3521). The trustees provided for in the foregoing section are to be appointed by the directors of the insurance company with the approval of the insurance commissioner; a certified copy of the vote by which they are appointed and the deed of trust under which they hold are to be filed in the office of the insurance commissioner (Sec. 3522), and the insurance company and insurance commissioner are expressly authorized to make public the amount of assets deposited and the fact that they are held for the benefit and protection of American creditors and policyholders (Sec. 3509).

The deed of trust in the case at bar was carefully drawn to effectuate the purposes of these Connecticut statutes. It begins by reciting the statutes in question and that it is executed "to the end that the aforesaid statute of the State of Connecticut may be fully complied with" (p. 24). After constituting and appointing trustees, it provides that:

> "The said Trustees shall receive, hold, possess, and safely keep all assets and property of every kind and description which shall from time to time hereafter be delivered to them by the Company, *the same to be held, used and appropriated to and for satisfying the purposes in the act of the Legislature above mentioned, to be held in trust for the Company*" (par. FIRST, p. 24).

And it is further provided:

> "If at any times debts and liabilities for the security of which this trust is created, shall accrue and become due and payable by the Company, and shall not be otherwise satisfied and paid, *the Trustees shall have power to appropriate so much of the said trust property as may be necessary to the payment and satisfaction thereof,* but no alleged debt or liability shall be so paid or satisfied unless and until the amount and validity of the said alleged debt or liability in each case shall have been admitted by the Company, or until the validity and amount thereof shall have been established by the claimant in due course of law" (par. FOURTH, pp. 24-25).

Provision is made for the withdrawal of such proportion of the fund as may be necessary, but only for the purpose of making a deposit in any other State or States of the Union as a basis for doing business therein (par. FIFTH, p. 25). We have already seen that the insurance law of the State of Connecticut recognizes such deposits in other States as of equal validity with deposits in the State of Connecticut; and the statutes of practically all the States make such deposits subject to the same trusts as those expressed in

the deed of trust under consideration—namely, the security of all policyholders and creditors in the United States.

The trust deed further provides:

> "After making due provision for the purposes aforesaid and subject to the provisions hereinbefore contained, the Trustees shall stand possessed of the said trust fund, at the control and subject to the order of the Company, and shall and will use and dispose of the same as the Company may direct or appoint. *But it is hereby expressly declared and provided, that until all the outstanding liabilities and obligations of the Company,* ABSOLUTE OR CONTINGENT, *to policyholders or creditors in the United States, are fully paid and discharged, the said trust fund, or so much thereof as may be necessary to cover the outstanding liabilities shall remain in the possession of the said Trustees, for the security and protection of the said policyholders and creditors,* ANYTHING HEREIN CONTAINED TO THE CONTRARY NOTWITHSTANDING" (par. NINTH, p. 25).

And in paragraph TENTH (p. 25) it is provided that the company reserves the right to alter the trust and powers declared by the instrument in such manner "as shall be according to law, provided that the rights of its policyholders and creditors in the United States shall not be thereby impaired."

The Contention of the Libellant and the Decision of the Circuit Court of Appeals.

It was contended by the Alien Property Custodian in the courts below that this instrument did

not create a trust at all; that the securities were merely deposited with the plaintiffs in error for safekeeping; but that they remained the absolute property of the Munich Re-Insurance Company.

This view was not shared by the Circuit Court of Appeals (which decided all the other questions in the case in favor of the Alien Property Custodian). That court in its opinion (Transcript, p. 93) disposed of this contention as follows:

> "It will not be necessary to set out the terms of the trusts at length; it is enough to say that although the income of the securities is payable to the Companies and they can withdraw them or any of them upon substituting others equally good and can change the trustees, *still the trustees hold the securities in trust to pay the claim of any policyholder or creditor admitted to be due by the company or established by the claimant in due course of law.*
>
> "It is apparent that the trustees hold primarily for the benefit of the policyholders and creditors, and *secondarily* for the benefit of the Companies: *but their duties are active*, and they are not merely lien holders. The Companies cannot take the securities out of their possession until the rights, absolute or contingent, of all policyholders and creditors in this country are secured, *and in the meantime the trustees have the active duty of collecting and paying over the income, investing or reinvesting and paying claims properly proved.*"

The Decisions of Connecticut and Other Courts.

The conclusion of the Circuit Court of Appeals is amply sustained by the numerous authorities

which have passed upon deposits of a character identical with that in the case at bar.

Inasmuch as the instrument to be construed was delivered for the express purpose of complying with the provisions of the Connecticut law, the construction of that instrument is upon well settled principles controlled by the Connecticut decisions. It cannot be too strongly emphasized that the question here involved is purely one of the construction of a written instrument delivered under State laws, and that it has nothing whatever to do with the war powers of the Federal Government or with the relative powers and conflicting jurisdictions of the Federal and State courts. In our Third Point we shall argue that all that can be seized in a proceeding like the present one is the interest of the enemy, and that no property not belonging to an enemy may be taken by the Custodian under the Trading with the Enemy Act. That argument will be addressed to the construction of the Trading with the Enemy Act. But the sole question under discussion in the present point is, What are the legal rights, titles and interests existing in the property sought to be seized? Is it the property of an enemy or the property of American citizens? Has the enemy such an interest in the property as to entitle him to the immediate possession thereof or has he not? These are questions to be determined wholly without reference to the provisions of the Trading with the Enemy Act or even to the existence of a state of war. They are simply questions of private municipal law of the State of Connecticut, and they are ruled by the laws and decisions of that State.

It so happens that the decision generally recognized as the leading case on this branch of the law is a Connecticut decision (*Cooke* v. *Warner*, 56 Conn., 234). In that case a deposit had been made by a Connecticut insurance company with the State Treasurer of Connecticut, under a statute identical in its provisions with those we have been discussing. There was no trust deed, but the fund was simply deposited with the State official in accordance with the statute. The company subsequently becoming insolvent, receivers were appointed "with full power and authority immediately upon their qualification as receivers, to enter upon and take possession of all and singular the estate and property of every kind or nature of said corporation, real or personal, corporeal and incorporeal, including all the moneys, credits, choses in action, evidences of debt, books, deeds, leases, contracts, papers and vouchers, or in whatsoever way said property or evidence of property may be owned or designated, and the same to demand, collect, or receive by suit or otherwise" (p. 237). It will be noted that in this case the receivers were vested not only with every right of the corporation, but also with the rights of its creditors. By virtue of their appointment, the receivers applied to the court for an order compelling the State Treasurer to turn over the assets constituting the trust fund to them. The court denied the application, saying at page 239:

> *"The effect of these statutes of our own and other states and of the act of the Continental Life Insurance Company in compliance therewith, is the creation of a trust fund in the hands of a trustee for a class of beneficiaries described with particularity;*

as perfect a trust as can be created by deed or will, and as much entitled to protection from the court.

"It is elementary law that a fund cannot be taken from a trustee in the absence of an allegation that he is wrong either in possession or in administration.

"By the statute of this state, upon the insolvency of an insurance company a judge of this court is empowered to appoint receivers of its assets and annul its charter. But this statute cannot confer upon the receivers power to disregard any existing lawful contract. They can no more compel the trustee to surrender property lawfully subjected to a trust, than they can compel a mortgagee or pledgee to release without payment.

"It is of no legal significance that they aver that they intend to apply the fund for the benefit of those for whom it was created. So will the trustee.

"The duty of the receivers is to convert assets and pay creditors *pro rata*. It is found that the company has creditors who are not policyholders. If the trust fund is placed in the hands of the receivers, it may become impossible to prevent the application of it to the claims of general creditors. Even if it should be placed in the hands of the receivers under an order limiting the application thereof to policyholders, it may become legally impossible to enforce it."

The doctrine of this case was reaffirmed in the recent case of *Brackett* v. *Middlesex Banking Co.*, 89 Conn., 645, 655. The fund involved in this case was created by a voluntary deposit by a banking company with unofficial trustees to secure debenture bonds, the deposit not being in pursuance of any statute. The situation presented was quite

similar to that in the *Cooke* case and in the case at bar. Although there were strong equities in favor of giving possession of the securities involved to the receivers, the court said at pages 654-655:

> "The receivers, as a general rule, can do what the insolvent company could have done; they take its assets burdened with all valid liens and equities against it (citing cases). *The trust companies held this collateral under the trust agreements as trustees for the benefit of the debenture-holders. The mortgages deposited with them constituted a trust fund. The Banking Company had, until the debenture-holders were paid, no right over this collateral except that of substitution of collateral of equal value.* The receivers had no higher right than the Banking Company had. They could not interfere with, nor be given the power to interfere with, the *vested rights* of the debenture-holders in this collateral, nor could they take or be given possession of this collateral until the debts were fully satisfied.
>
> "When a debtor has deposited collateral with a trustee as security for the payment of his debt, the trustee cannot be compelled to surrender to receivers of the insolvent debtor the collateral until the debt is paid. And after default, if the trust be one to apply the proceeds of the collateral for the benefit of the secured creditor, the trustee is entitled to administer the trust as against the receivers of the insolvent. The authorities are in practical agreement in this doctrine and in its application. In *Cooke* v. *Warner*, 76 Conn., 234, 14 Atl. 798, an insurance company had *voluntarily* deposited with the State treasurer securities in trust for its policyholders. The company became insolvent, and receivers were appointed. *In a suit brought by the receivers claiming*

these securities, we held that this fund was a trust fund which could not be taken by the receivers from the trustee. Matter of Home Provident Safety Fund Ass'n, 129 N. Y. 288, 29 N. E. 323; *Matter of Binghamton G. L. Co.*, 143 N. Y. 261, 38 N. E. 297; *Ruggles v. Chapman*, 59 N. Y. 163, 165; *Risk v. Kansas Trust & Banking Co.*, 58 Fed. Rep. 45; *Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 139; *Real Estate Trust Co. v. New Zealand L. & T. Co.*, 93 Fed. Rep. 701; *Brady v. Furlow*, 22 Ga. 613. This rule rests upon the inviolability of contracts."

In view of the claim made on behalf of the Custodian in the Circuit Court of Appeals that the cases cited by us dealt only with possession and not with title, attention is called to the italicized passages in the above quotations.

These cases establish the proposition in the State of Connecticut (and, as we have already pointed out, it is according to Connecticut law that the instrument at bar must be interpreted) that a trust deed such as the one at bar creates a real trust, the terms of which are binding upon the trustees, upon the insurance company and upon the successors in interest of the insurance company. The deed of trust is a contract creating valid property rights in the policyholders; that contract and those rights are inviolable, and it is the right and duty of the trustees to retain the trust fund and pay it out only for the purposes authorized by the trust deed.

These decisions have the support of numerous decisions rendered by courts of States other than Connecticut (*Risk v. Kansas Trust & Banking Co.*,

38 Fed., 45; *Lancashire Ins. Co.* v. *Maxwell*, 131 N. Y., 286; *Matter of Home Provident Safety Fund Assn.*, 129 N. Y., 288; *People ex rel. Ruggles* v. *Chapman*, 64 N. Y., 557; *Ruggles* v. *Chapman*, 59 N. Y., 163; *Babcock Mfg. Co.* v. *Ranous*, 31 App. Div., 629; affd. 164 N. Y., 440; *Fullerton* v. *National Burglar & Theft Insurance Co.*, 63 How. Pr., 5; affd. 16 Wk. Dig., 56; 28 Hun, 322; 100 N. Y., 76; *Duncan* v. *Stanton*, 30 Barb., 533; *Vandiver* v. *Poe*, 119 Md., 348; *Vandiver* v. *Fidelity Savings Bank*, 120 Md., 619; *Insurance Co.* v. *Hambitzer*, 95 Mich., 513; *Falkenbach* v. *Patterson*, 43 Ohio St., 359), including two carefully reasoned opinions of the Court of Appeals of the State of New York rendered through PECKHAM, J., later a member of this Court (*Lancashire Ins. Co.* v. *Maxwell*, *supra*; *Matter of Home Provident Safety Fund Assn.*, *supra*).

In *Matter of Home Provident Safety Fund Assn.*, 129 N. Y., 288, securities were deposited with a trust company under an instrument almost identical with that at bar (see *infra*, p. 104). A receiver of the depositing insurance company was appointed and sought to obtain possession of the funds. The court said, by PECKHAM, J. (p. 294):

> "The first question which here arises is as to the power of the court upon proper notice and hearing, to take this fund out of the hands of the trust company and administer it through the instrumentality of its own receiver. * * *
>
> "It does not appear to us that the power exists. We do not question the right of the court upon dissolution of the corporation, to decree distribution of its funds among those of its creditors, or policy or certificate hold-

ers, who may be entitled to them. This is a different power from the taking away by the court from a *trustee* the funds placed in his or its hands for a specific purpose by the dissolved corporation and itself distributing the fund through its receiver instead of through the trustee. *The trustee is still entitled to the possession of the trust fund, as provided for in the contract which had been made, and that contract is to be the measure of its liability and the guide for the discharge of its duties.* When by the dissolution of the corporation, a default has occurred in the payment of its liabilities to the holders of the certificates, the duty of the trustee under the contract still remains. The company having defaulted and dissolution having taken place, and so the authority of the court having come into play, that authority would seem to be confined to compelling the trustee to distribute the fund as provided for by the contract and under the supervision and orders of the court. I see nowhere any authority in the court to itself take possession of the fund with the payment of which the trustee was itself charged under and by virtue of a valid contract, the obligations of which still remained as against the trustee. Certainly, the right of the trustee to retain its possession is as strong where founded upon a valid contract, as in the case of a trustee created by statute."

Extremely interesting is the case of *Lancashire Ins. Co.* v. *Maxwell*, 131 N. Y., 286. In that case an insurance company had, pursuant to statute, deposited funds with the New York State Superintendent of Insurance in trust for the benefit of all policyholders in the United States. But although the statute required a deposit of only $200,-

000, the company had made a deposit considerably in excess of this sum. Later, in order to comply with the laws of the State of Massachusetts, the insurance company sought to withdraw from the State Superintendent of Insurance the excess over $200,000, not for the purpose of mingling the same with its general funds, but solely to deliver it to trustees who should hold in trust for the same purposes for which the deposit was originally made. It was conceded by all parties that the money was held in trust by the Superintendent of Insurance for the benefit of policyholders. The contention of the insurance company was not that the money was the property of the insurance company, but that, being held in trust, the court might in a proper case substitute trustees of its own choice for the one originally appointed. The decision of the lower court (5 N. Y. Supp., 399) granting the claim of the insurance company, which was later reversed by the Court of Appeals, did not question that the property was held in trust by the Superintendent of Insurance, but merely held that a court of equity had a right to substitute one trustee for another. As stated by the General Term on the intermediate appeal, there was no question that the property was held in trust, the only question in the case being whether the Superintendent of Insurance held title "as a voluntary trustee" or as a trustee "in his public or official character" (Opinion per WILLARD BARTLETT, J., later Chief Judge of the Court of Appeals of New York, 61 Hun, 360, 362). The Court of Appeals held that the Superintendent of Insurance was trustee in his official capacity, saying in the opinion by PECKHAM, J.:

"Although the minimum sum to be deposited under this act with the superintendent of insurance equaled the minimum amount of capital which home companies organized to do business in the county of New York or Kings were permitted to have, *yet the sum so deposited was not technically the capital of the company making the deposit. It was a trust fund placed in the hands of an official trustee for the benefit of policy holders in the United States. It was a special security to such persons, and although it might have been taken from the capital of the company, yet when deposited with an official trustee under our own statute, it became a trust fund for the specially-named policy holders to which they could resort by virtue of the deposit, and not because it was capital in any sense.* • • •

"The whole deposit constitutes but one sum and the whole is made in trust for the benefit of the same policy holders and is in fact and law one trust fund" (pp. 289-290).

"• • • I see no special force in the fact, conceding its existence, that the fund thus deposited might be liable for the other debts of the company after the policy holders had been satisfied. The primary persons for whose benefit the fund is deposited are the policy holders, and what becomes of the fund after it has satisfied those for whose benefit it was primarily liable is not important to them. *The superintendent is not a trustee for any other than those named in the statute"* (p. 291).

"Although under the Act of 1871, it may be regarded as in the light of capital for certain purposes, yet it is at all times capital impressed with the special trust provided for in the statute, and there is no power in the court to authorize or direct its

> withdrawal from the official trustee upon any terms or conditions whatever" (p. 292).

To the same effect are the other cases cited above. See especially *Risk* v. *Kansas Trust & Banking Co.*, 58 Fed., 45; *Vandiver* v. *Fidelity Savings Bank*, 120 Md., 619.

The cases cited by the Alien Property Custodian below are not in point and are not controlling here.

The case of *Security Co.* v. *Town of Hartford*, 61 Conn., 89, strongly relied on by the Alien Property Custodian in the lower courts, is entirely inapplicable to the question what right or title to the securities is vested in the Munich Re-Insurance Company. The question in that case was whether property constituting such a fund was taxable. The case turned not on legal title or right to possession, but on the equities of double taxation. Counsel for the defendant in the course of his argument said (p. 93):

> "It is utterly unimportant whether this fund belongs to the certificate holders or to the insurance company."

Under the taxing system of Connecticut, the value of shares of stock in the insurance company had already been subject to taxes levied on the stockholders. The question was whether it was equitable again to tax assets the value of a fund which contributed to the value of the shares already taxed (p. 102).

Now, in the record in the *Security Company* case, it specifically appeared in evidence that the equity of the company in the fund was very valu-

able, and that it contributed materially to enhance the value of the shares of stock (p. 95). In view of this evidence, it would be difficult to imagine the court reaching any other conclusion than that which it did reach—namely, that for taxing purposes, the fund formed part of the capital stock of the company.

But the fact that for some purposes the fund is to be considered part of the capital stock of the company in no way affects our argument. We have already seen (p. 84, *supra*) that for certain purposes these funds are by express statutory provision considered part of the capital stock of the company creating them (Revision of Connecticut Statutes, 1902, Sec. 3521; 1918, Sec. 4105); and this fact did not in any way affect the decision of the court in *Cooke* v. *Warner* and in *Brackett* v. *Middlesex Banking Co., supra*. And express authority is not wanting that this fact does not make the fund in any less degree a true trust fund for the sole benefit of American creditors and policyholders (PECKHAM, J., writing for the unanimous court in *Lancashire Insurance Company* v. *Maxwell*, 131 N. Y., 286, 291-292; quoted *supra*, p. 96).

And in the *Security Company* case, the court in no way impaired the doctrine of the *Cooke* case. An examination of the opinion will show that the court was very guarded in the use of its language, and confined its decision to the precise question involved in the case—the question of taxation.

At page 96 the court, in stating the facts, said:

> "We think the case turns upon the question whether the property in question belongs to the Hartford Life & Annuity Insurance Company, *as part of its assets upon*

> *which the market value of its shares of stock is based.*"

In view of the evidence in the record that the property did as a matter of fact make the market value of the shares of stock greater than it otherwise would have been, it would seem that only one answer could be given to this question. At pages 98-99 the court said:

> "All of the money agreed to be paid under the certificate becomes, when paid, the money of the company, *at least so far as the present question is concerned.*"

And at page 100, in summing up its decision, the court said:

> "In short, after fully considering both contracts, we are unable to resist the conclusion that the property of this safety fund is the property of the insurance company, *subject to all the claims, rights and interests of others acquired therein by virtue of contracts made with the insurance company, its owner.* We hold, therefore, that the property constituting the safety fund belongs to the insurance company, as cestui que trust, and not to the certificate holders."

It is obvious, therefore, that the *Security Company* case, even if it were authoritative, could have no bearing whatever upon the case at bar.

But as a matter of fact, *Security Company* v. *Town of Hartford* is not now law in Connecticut. If it were in any degree in conflict with the rule of *Cooke* v. *Warner,* it would be to that extent overruled by the recent case of *Brackett* v. *Middlesex, supra* (89 Conn., 645), which reaffirms and applies the doctrine of *Cooke* v. *Warner.* Fur-

thermore, *Security Company* v. *Town of Hartford* has been overruled upon the point which really constitutes the basis of its decision (*Roberts* v. *Automboile Ins. Co.*, 89 Conn., 181, 187). It consequently no longer has any value as an authority in its own jurisdiction.

The case of *Farmers Loan & Trust Co.* v. *Aberle*, 19 App. Div., 79, relied on by the learned counsel for the libellant, is utterly inapplicable. Obviously, the Appellate Division did not in that case intend to overrule the repeated decisions of the Court of Appeals. Nor is there any inconsistency between the decision in that case and the doctrine repeatedly laid down by the highest court of the State of New York. Indeed, that case very properly distinguishes the *Home Provident Safety Fund* case (pp. 86-88). An examination of the trust instrument in the *Aberle* case (which was purely voluntary, and not pursuant to any statute) shows how thoroughly it is inapplicable to the case at bar. The instrument appears as Exhibit A in the Book of Exhibits annexed to the printed record in the case. It provides, among other things, that the "Trust Company shall from time to time, upon the written order of the President of the said Association (the depositor of the assets in question), invest said Reserve Fund so deposited, or any portion of it, in such United States Bonds, Bonds, State, County, City or other lawful interest bearing securities, or on such Bond and Mortgage securities, as shall be designated by the Board of Directors of said Association, and approved by the President of said Trust Company, *said securities shall be taken only in the name of said Association*" (par. First, fol. 6); and that "*upon receipt of a*

certified copy of a vote of Board of Directors of said Association authorizing the transfer of any portion of said Reserve Fund, such transfer shall be made by said Trust Company. But in every case the resolution of the Board of Directors authorizing such transfer shall *state* that such transfer is authorized by Sections Nos. 4 and 5, Article No. 7 of the By-laws of the Association" (par. Third, fols. 8-9). *Moreover, the court expressly found that the instrument did not contemplate that the trust company should have any duties in connection with distributing the fund* (p. 88). But the most striking feature of the so-called deed of trust in that case, and the one which most sharply distinguishes it from the deed of trust both in the cases we have cited and in the case at bar, is that the so-called deed of trust in the *Aberle* case contains no provisions whatever as to the purpose of the trust, no reference to any statute, and absolutely no provision whatever regarding what the trustee is to do with the funds, except the provisio already quoted that it must pay them out on the order of the creator of the trust.

It needs no argument to show that such an instrument as this does not create a trust, but that the so-called trustee was a mere depositary of funds for the company. Indeed, it is difficult to understand how any other conclusion or opinion could have been possible. And a reading of the opinion of the Appellate Division in that case will show that its decision is based wholly upon the extraordinary form of this so-called trust deed, and is in no way intended to encroach upon the rule of the *Home Provident Safety Fund* and *Lancashire Insurance Company* cases.

Two Federal cases (*Morrill* v. *American Reserve Banking Co.*, 151 Fed., 305; *Robinson* v. *Mutual Reserve Life Insurance Co.*, 162 Fed., 798) were cited by the Custodian in the Circuit Court of Appeals for the proposition that even if the Connecticut decisions established that the Munich Re-Insurance Company had no title or right to possession of the funds, the Federal court should disregard those decisions. The cases do not hold any such proposition. *Robinson* v. *Mutual Reserve Life Ins. Co.*, so far from disregarding or overruling the State court decisions, expressly follows them. Judge WARD in that case examined the trust deed and authorized the receiver to take possession from the trustee simply because upon examination he found that it imposed no duty on the receiver and made him simply an agent of the depositor, as in the case of *Farmers Loan & Trust Co.* v. *Aberle*, 19 App. Div., 79, *supra*. On this ground the *Home Provident Safety Fund Association* case (129 N. Y., 288) was distinguished, but its authority was expressly recognized. The *Morrill* case was a motion by a receiver appointed on behalf of the very creditors secured by the trust, in which all parties concurred, including those creditors, excepting the State officers, who gave the court to understand that they were in sympathy with the motion but desired to have their duty adjudicated by the court. ***The State statute applicable, and under which the trust was created, expressly authorized the appointment of a receiver in the event of insolvency, who should take over the funds from the trustee and liquidate for the benefit of those entitled*** (p. 311). Furthermore, it appeared that the trustees were given no power to convert the funds into money or

distribute the proceeds, their sole authority being to hold possession (p. 311). It is true that there was some language in the opinion tending toward the view that the court had power to disregard the authority of State decisions; but the real grounds of the decision were that the trust, like that in the *Aberle* case, was one in name only, and that by express statutory provision, forming a part of the trust, authority was given to appoint a receiver who should liquidate. It is unthinkable that Circuit Judge SANBORN, who wrote the opinion, should have intended to hold that he might disregard the State law, when the same judge had previously held that he was bound by it and that a receiver had no power to take from a true trustee funds deposited with the latter for the security of a particular class of creditors (*Risk* v. *Kansas Trust & Banking Co.*, 58 Fed., 45).

There Is Nothing in the Provisions of the Trust Deed in the Case at Bar to Take It Out of the Rule of the Cases on Which We Rely.

Much was made by the libellant in the courts below of certain provisions in the trust deed which, it was claimed, deprived it of its character as a true trust and made the trustees mere depositaries or custodians. This claim was summarily disposed of by the Circuit Court of Appeals at the outset of their opinion (Transcript, p. 93) in a passage we have already quoted (*supra*, p. 87). It is also conclusively answered by the fact that the trust deeds involved in the leading cases we have cited contain provisions identical with those relied on by the libellant in the case at bar.

In the *Home Provident Safety Fund Association* case (the leading New York decision from which we quoted extensively above), the trust agreement which the court in such vigorous language held to vest absolute title in the trustee, and which the court said was "the measure of its liability and the guide for the discharge of its duties" (129 N. Y., at p. 295), and which was held to deprive the court of power to remove the property from the trustee's possession (129 N. Y., at pp. 294-295), contains the following provisions:

(1) That the trustees shall pay claimants on presentation of a certificate "accompanied by satisfactory evidence, as hereinafter provided" (Record on Appeal in Court of Appeals, p. 7, fol. 20). It then defines such satisfactory evidence as follows:

> "The evidence referred to above to be either certification by said association's President or Secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for a period of sixty days from its date" (fol. 21).

(2) That "the income thereof, less the reasonable compensation and expense of said trust, *to be paid over to the party of the first part, as hereinafter provided, to be used by the party of the first part in accordance with the hereinbefore recited agreements;* and when said trustees shall pay the income as above to party of first part, or shall make any other payments from said funds, as required

by the terms hereof, the liability of said trustee to the amount so paid shall cease; *it being understood and agreed that the said funds belong to the party of the first part, subject to the express trusts herein provided*" (Record in Court of Appeals, fols. 23-24).

(3) That the trustee "shall at all reasonable times exhibit to the party of the first part (the Home Provident Safety Fund Association) all the securities and investments composing said trust fund; and shall render true statements of the account of said funds and the income thereof to any person entitled to request the same by reason of an interest therein" (Record in Court of Appeals, fol. 23).

(4) "That if the said party of the second part shall, for any cause, fail to perform its duties as such Trustee, as hereinbefore specified, *or if it shall be deemed expedient to remove said trust from its hands, then a new Trustee may be appointed by the nomination of said association, confirmed by one of the Justices of the Supreme Court of the District in which the principal office of said association shall be located to succeed to the trust, with all the duties and obligations herein imposed upon said original trustee, and said party of the second part shall surrender said funds to such successor*" (Record in Court of Appeals, fols. 31-32).

So, in the case of *Fullerton* v. *National Burglar & Theft Insurance Co., supra*, in which, also, the instrument involved was held to create a real trust which the Court had no power to disturb, the instrument (Exhibits A and B annexed to the Complaint, fols. 23-46 of Record on Appeal to the General Term) contained the following provisions:

(1) That the trustee is to hold and retain the bonds and mortgages as security for policyholders of the insurance company "*until the latter company shall make a deposit for a like purpose with the Insurance Department of the State of New York in pursuance of any legislation which may be hereafter had for that purpose*" (par. FIRST, fols. 26-27, 38-39).

(2) That the "National Burglar & Theft Insurance Company of the City of New York reserves the right to collect and receive any and all interest which may become due and owing upon the principal sum named in said mortgage, and to retain such interest when received for its own use" (par. SECOND, fols. 27, 39).

(3) That if at any time the insurance company shall request the foreclosure of the mortgage held by the trustee, then the trustee *must* permit foreclosure in its own name (par. THIRD, fols. 28-29, 40-41).

(4) That if at any time the insurance company requires the bond and mortgage for the purpose of making a special deposit with the Superintendent of Insurance of the State of New York as security for policyholders, or shall present a certificate that it has deposited an equivalent amount of deposit with the Insurance Commissioner for the protection of said policyholders, "then and in either case said Farmers Loan & Trust Company (the trustee) shall reassign and surrender the foregoing bond and mortgage to said National Burglar & Theft Insurance Company of the City of New York, or its assigns" (par. FOURTH, fols. 30-31, 41-43).

(5) That "said The National Burglary & Theft Insurance Company of the City of New York reserves the right to substitute other security or securities in place of the foregoing bond and mortgage, and in case any such substitution is made, then said Farmers Loan & Trust Company is to reassign and redeliver said bond and mortgage to the said National Burglar & Theft Insurance Company of the City of New York or its assigns" (par. FIFTH, fols. 31, 32).

So in the leading Connecticut case of *Brackett v. Middlesex Banking Co., supra*, in which the court came to the same conclusion, the instrument under consideration provided that the banking company had the right to withdraw any of the securities deposited with the trustee on substituting other collateral of equal value (89 Conn., p. 649).

In the case at bar, therefore, both reason and authority make it clear that the deed of trust created a real trust for the sole benefit of American creditors and policyholders—a trust which could not be terminated either by the insurance company, by the trustees, or by both acting together. The only purpose of the trust was to comply with the Connecticut law by creating a trust fund for the benefit of all policyholders and creditors of the insurance company in the United States. Under the terms of the deed the insurance company had certain rights with regard to the administration of the property; *but it had no beneficial right whatever, excepting the bare residuary right of having the balance (if any) of the fund turned over to it after all its liabilities to American creditors and policyholders, absolute and contingent, should have been paid and satisfied* (Deed of Trust, par. NINTH, p. 25).

POINT III.

As a matter of substantive law, the Trading with the Enemy Act entitles the Alien Property Custodian to take over enemy property only, and he acquires no greater rights than the enemy had.

In the last point we showed that the property sought to be seized in the case at bar is vested in American trustees for the benefit of American citizens. In the first point we showed that, as a matter of procedure, it is for this Court to determine the substantive rights of the parties. It remains to be considered what rights are, as a matter of substantive law, vested by the Trading with the Enemy Act in the Alien Property Custodian.

That question, vast as is its importance, is not difficult of solution if the conditions of the problem are kept clearly in mind. The confusion which has arisen on this point in the lower courts has been due largely to the fact that questions of adjective law and of substantive law have been commingled together, instead of being clearly separated. It is one question whether the determination of the Alien Property Custodian is conclusive; it is an entirely distinct question what the principle guiding that determination should be. The first question is one of procedure; the second, one of substantive law. The two questions are absolutely independent of each other. Any solution of one of them is consistent with any solution of the other.

Section 7c of the Trading with the Enemy Act, as originally enacted, provided:

> "(c) If the President shall so require, any money or other property *owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy* not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

In the Circuit Court of Appeals we contended that this section, in accordance with what seemed to us its plain language, meant that in order that the obligation to pay over to the Custodian should arise, *three* things must co-exist: first, that the property *is* "money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President"; second, that the President should, after investigation, *determine* that it is so owing, or so belongs, or is so held, and, third, that the President should require a conveyance, transfer, assignment, delivery or payment over.

The learned counsel for the Alien Property Custodian, on the other hand, contended that Congress had not said what it really meant, but that the language of the section was simply an awkward way of saying

> "If the President shall so require, any money or other property which the President shall after investigation *determine* is owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of a enemy or ally of enemy not holding a license granted by the President hereunder, shall be conveyed, transferred, assigned, de-

> livered or paid over to the Alien Property Custodian."

and that consequently only *two* things must coexist to give rise to an obligation to pay over: first, a *determination* by the President that the property is "money or other property owing or belonging to or held by, for, on account of or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President"; and, second, a requirement.

If our argument under Point I of this brief is sound, the Custodian's construction was wrong and ours was right. It is not our intention to reargue that point here. We are restating it merely for the purpose of showing that the question there involved is entirely irrelevant to the point that we are now discussing. For whether our construction or the Custodian's construction is correct, it remains to be determined what is "money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy" within the meaning of the section; and that question is one of substantive law purely, and has nothing to do with the procedural question whose duty it is to determine it.

Looking at the question as one purely of substantive law, there can be no possible doubt that the Trading with the Enemy Act was intended to vest in the Custodian enemy property only, and that he was not intended to have any greater substantive rights than the enemy had. This construction is made inevitable by the constitutional basis of the Act and by the manifest absurdity, gross injustice to our citizens, and, to say the least,

doubtful constitutionality of any other construction; by the history and clear language of the Act; and by the uniform course of judicial decisions under similar acts of this country and England.

The constitutional basis of the Act, as well as the manifest absurdity and gross injustice of any other construction, make it clear that as a matter of substantive law, the Act was intended to vest in the Custodian no more than the interest of the enemy.

As we have shown in the First Point, the sole constitutional basis of the provisions of the Trading with the Enemy Act relating to enemy property is the belligerent right to confiscate the property of enemies in time of war. Of course, it has never been pretended that the mere existence of a state of war authorizes the confiscation of the property of our own citizens. We should naturally assume, therefore, that the Act is intended to seize only such rights, titles and interests as were vested in enemies, leaving intact those of our own citizens. Any other construction would be, to say the least, of doubtful constitutionality, and must therefore be avoided (*U. S. v. Jin Fuey Moy*, 241 U. S., 394, 401).

Upon closer analysis, this assumption would be confirmed. The manifest absurdity and the shocking injustice to our own citizens resulting from any other construction—injustice required by no legitimate purpose or policy—would be sufficient reason for rejecting it, unless constrained by language so clear as to leave no doubt that that construction was intended.

A few specific examples will show the effect on our own citizens of any construction of the Trading with the Enemy Act vesting in the Alien Property Custodian any greater rights than those possessed by the enemy.

The case of joint tenants or tenants in common of real or personal property is a case in point. Suppose one such co-owner were an alien enemy, the others being American citizens, could it be seriously contended that the Alien Property Custodian was thereby vested with the right to exclusive possession of the entire property?

Suppose that an enemy had bailed personal property to an American citizen for the next ten years for a valuable consideration which had been fully paid before the war. Is it thinkable that the Trading with the Enemy Act would vest the Alien Property Custodian with the right to immediate possession of the chattels bailed simply because the enemy has a reversionary interest in them after ten years?

Suppose an enemy doing business in the United States made, before the war, an assignment for the benefit of his creditors. Can it be supposed that during the administration of this trust the property could be removed from the hands of the assignee by the Alien Property Custodian simply because if there *should* turn out to be any surplus it would be payable to the enemy?

Suppose the case of an alien enemy who had gone into bankruptcy here before the war. Can it be supposed that the Trading with the Enemy Act vests in the Custodian the right to take possession of the bankrupt estate from the trustee in bankruptcy simply because if there *should* be a surplus

over the claims of creditors that surplus would belong to the enemy?

Suppose that upon the arrest of an American citizen under criminal process of the State of New York an alien enemy had deposited cash bail to secure the prisoner's release pending trial. Can it be supposed that the Trading with the Enemy Act would authorize the Alien Property Custodian to take possession of the cash bail as against the State authorities merely because if the prisoner should ultimately be released or should serve his term the enemy would be entitled to the return of the money deposited?

It would be easy to multiply these examples indefinitely; but those given suffice to show the unreasonableness of any construction of the Trading with the Enemy Act which would enable the Custodian, under the guise of seizing the enemy property, to take away substantial rights of our own citizens.

The history and language of the Act again demonstrate that Congress intended to vest in the Custodian no more than the enemy had.

The reports of the Senate and House Committees show clearly that they supposed that the Act was intended to seize only *enemy property*.

The Senate Committee in its report on the Trading with the Enemy Act, discusses the matter as follows:

> "Section 6 provides for the general administration of the bill by the President and for the appointment of a new official known as the alien property custodian, who shall have charge of all *money or property belonging to an enemy or ally of enemy* which may be paid

or conveyed to him under the provisions of the bill.

"The bill next provides for the power of the Government to deal with *enemy property* so as to conserve and utilize such property found within its jurisdiction so far as practicable, both in the interests of this Government and of the enemy owner. The general provision is made that the Government may require any form of *enemy property* found within the United States to be paid or conveyed to the alien property custodian, and any person holding *enemy property* in this country is given the option, with the consent of the President, to transfer such property into the hands of the Government.

"The most novel and important feature of this portion of the bill is the requirement that all money and quick assets paid over to the Government shall be invested in United States bonds. So far as known this is an entirely new provision, contained in no previous statute. It is in line, however, with the modern and advanced lenient policy with reference to private property in time of war. By this means, *enemy property* is temporarily conscripted by the Government to finance the Government through investment in these bonds, and to be paid back to the enemy or otherwise disposed of at the end of the war, as Congress shall direct. In other words, we fight the enemy with *his own property* during the war, but we do not permanently confiscate it. This temporary conscription of *enemy property* is also conservation of *enemy* property, for it takes the property from the hands of debtors or agents, as to whose solvency the enemy would otherwise be obliged to assume the risk, and it invests the property in the safest security in the world —bonds of the United States, or deposits it

in Government depositaries" (pp. 6-7, Senate Committee Report).

"Section 7 (*c*) provides that the President may require any *enemy property* to be paid to the alien property custodian" (Senate Committee Report, p. 7).

"Section 11 contains provisions for the preservation of *enemy property* by governmental agency and in the interest of the enemy himself. The chances of trade in time of war may involve the solvency of debtors or holders of *enemy property*, but the taking over and custody of the property by the Government gives to the enemy the best possible protection. Not only is the *enemy property* preserved and protected, but provision is made for its utilization in the interest of this Government" (Senate Committee Report, pp. 8-9).

"While the theory on which the bill is drafted is that *enemy property* shall be protected and utilized, but not confiscated, the ultimate disposition of the *enemy property* received and held by the Government is left entirely to Congress, and provision is made that after the end of the war enemy claims to such property 'shall be settled as Congress shall direct'" (Senate Committee Report, p. 9).

The House Committee in its report on the bill takes the same view:

"In the order found in the bill the power of the Government to deal with *enemy property* is next reached (p. 7, sec. 6). It is manifest that the United States should as far as practicable conserve and utilize *enemy property* found within its jurisdiction. To this

end *such property* must be brought under the control of the Government, to be impounded or used, and to await such disposition at the close of the war as Congress may determine. Therefore, *enemy property* is required by its owner or its agents to be disclosed, and paid over, conveyed, transferred or delivered to an agent of the Government known as the 'alien-property custodian,' who is to be appointed by the Secretary of Commerce, with the approval of the President, and at a salary not exceeding $5,000. The custodian is empowered to receive *all money and property in the United States due or belonging to an enemy, or an ally of the enemy*, and to hold, administer, and account for the same in accordance with the terms of the act, or under the general direction of the Secretary of Commerce. • • •

"The act next contains rather comprehensive provisions for the disclosure of *enemy property*, and for the conveyance or transfer *thereof* to the custodian, and the Secretary of Commerce is authorized to make all regulations necessary to effectuate such conveyance or transfer" (House Committee Report, printed as Appendix A to Senate Committee Report, pp. 11-12).

THE LANGUAGE OF THE ACT.

Turning to the language of the Act itself, we find that its every provision confirms the conclusion that the framers of the Act intended to authorize the seizure of the rights, title and interest of enemies and of nothing else.

The section of the Trading with the Enemy Act which authorizes the appointment of the Custodian and defines his powers (Sec. 6) provides:

> "That the President is authorized to appoint * * * an official to be known as the alien property custodian, who shall be empowered to receive *all money and property in the United States due or belonging to an enemy, or ally of enemy,* which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and to account for the same under the general direction of the President and as provided in this Act."

There is nowhere in the Act any provision authorizing the Custodian to receive any money or property not "due or belonging to an enemy or ally of enemy."

Section 12 of the Act, after providing for the disposition of money paid over to the Custodian, provides:

> "All other *property of an enemy, or ally of enemy,* conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder shall be safely held and administered by him except as hereinafter provided."

This is the only provision in the law as to the safekeeping of property turned over to the Custodian.

Section 7c of the Trading with the Enemy Act, as originally enacted, provided:

> "If the President shall so require, *any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or*

ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

The amended form of that section shows still more clearly the intention of Congress to seize only the rights and interests possessed by enemies (Amendment of November 4, 1918):

"(c) If the President shall so require *any money or other property*, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description *owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy* not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of the conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any

rights therein or any other rights); and if so filed, registered, or recorded, shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever *any such property shall consist of shares of stock or other beneficial interest in any* corporation, association, or company or *trust*, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest *to cancel upon its, his, or their books all* shares of stock or *other beneficial interest standing upon its, his or their books in the name of any person or persons*, or held for, on account of, or on behalf of, or for the benefit of any person or persons *who shall have been determined by the President after investigation, to be an enemy or ally of enemy*, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, *and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian* or otherwise, as the Alien Property Custodian shall require." *

It is quite clear that this amendment also was not intended to enlarge the meaning of Section 7c, but merely to clarify it. In explaining the purpose of the amendment Mr. Lee C. Bradley, of counsel to the Alien Property Custodian, said:

* From the section as amended we have in this quotation omitted the last paragraph which has no bearing on the point now under discussion, but which we have already discussed under the First Point (*supra*, p. 71).

> "The amendatory matter to which we now call your attention provides, speaking broadly, that every right, title, and interest *of the enemy*, and every power *of the enemy* and liens and charges or encumbrances *in favor of the enemy* shall vest in the Alien Property Custodian" (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 12,338, p. 13).

The same result follows from the language of the section as amended. The *first* paragraph is obviously not intended to vest in the Custodian any greater rights than the enemy had, but only to make sure that he is vested with *all* such rights, however incorporeal their nature. The *second* paragraph provides that a requirement by the Alien Property Custodian, when recorded, shall have the same force and effect as "a duly executed conveyance, transfer, or assignment"; but as there is no form of conveyance or assignment known to our law that passes any greater interest than the grantor or assignor had, this provision obviously vests in the Custodian no greater interest than the enemy (whose position is analogous to that of grantor or assignor) himself possessed. And the *third* paragraph expressly recognizes that the Custodian is vested only with the interest of the enemy. It provides that whenever "*such property*" (*i. e.*, the property required to be conveyed to the Custodian by the general provision of the *first* paragraph) shall consist of a beneficial interest in certain forms of trusts, the trustee shall issue to the Custodian a certificate vesting him with *the beneficial interest of the enemy* in the fund. *It thus expressly recognizes not only the trustee's right to retain possession of the corpus of the fund, but*

also the fact that in the case of a trust the general provision of the first paragraph of the section applies only to the beneficial interest of the enemy.

This provision regarding beneficial interests in trusts applies to all trusts, not merely those the beneficial interest in which is represented by certificates or shares (see *Kahn* v. *Garvan,* 263 Fed., 909, 914). The Alien Property Custodian, therefore, is under this provision clearly vested with no more than the beneficial interest of the enemy in the trust. He has mistaken his remedy. Under that provision the proper procedure was not to attempt to seize the entire corpus of the fund, but to demand that the trustee recognize him as vested with all the beneficial interest of the enemy in the trust; as, indeed, he "most properly" (263 Fed., p. 913) did in the case just cited; and as, indeed, seems to have been the usual practice of the Alien Property Custodian in the case of trusts (see the first two demands in the case at bar, Record, pp. 30, 31, and statement of facts in *Spiegelberg* v. *Garvan,* 260 Fed., 302).

If these provisions left any doubt that the Trading with the Enemy Act is intended to vest the Custodian only with the rights and interests of enemies, that doubt would be dispelled by the provisions of Section 12 as amended March 28, 1918, and of Section 9. Section 12, as amended (40 Stat., 423, as amended by 40 Stat. 640) provides that "*in addition*" to "all of the powers of a common-law trustee" the Custodian, with respect to all property conveyed to him or required to be, pursuant to the Act, "shall have power to manage the property and do any act or thing in respect thereof *or make any disposition thereof or of any part thereof,*

by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof *in like manner as though he were the absolute owner thereof.*" Surely it was not the intention of Congress, *as a matter of substantive law*, to vest any such powers in the Custodian with respect to any property in which American citizens had an interest. Surely the only thing he was empowered to treat as though he were the absolute owner thereof is the right, title and interest of the enemy.

Section 9 authorizes debts due from enemies to be satisfied out of property seized as theirs by the Custodian either by the consent of the President or by suit. It is true that the Section as originally enacted provided that the President could not give such consent unless all persons claiming any interest in the property also assented. We have already seen (*supra*, p. 53) that this provision defied interpretation, and in any event was inapplicable in the event of suit; but even this safeguard was removed by the amendment to that Section enacted July 11, 1919. Surely Congress did not intend, *as a matter of substantive law*, to subject property of our own citizens, or in which they had an interest, to the claims of creditors of enemies. Obviously all that was intended to be so subjected was the interest of the enemy himself.

The Decisions.

THE DECISIONS OF THIS COURT IN OUR OWN CIVIL WAR ESTABLISH TO A DEMONSTRATION THAT THE ONLY RIGHTS VESTED IN THE CUSTODIAN BY THE TRADING WITH THE ENEMY ACT ARE THE RIGHTS BELONGING TO THE ENEMY.

A particularly close analogy is afforded by the Civil War cases, which are, indeed, conclusive in favor of our contentions upon most of the questions involved in the case at bar.

The Civil War Confiscation Act (12 Stat., 589, 590, Sec. 5) provided:

> "*And be it further enacted*, That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the Army of the United States, that is to say:"

thereupon enumerating the classes of persons whose property was confiscated.

The following section provides:

> "*And be it further enacted*, That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and procla-

> mation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof" (Sec. 6, p. 391).

The striking analogy of the language of these provisions to that of the present Trading with the Enemy Act is at once apparent.

Now it was thoroughly well established that the effect of the Civil War Act was to authorize the confiscation only of such interest in property, as the enemy proceeded against had (*Day* v. *Micou*, 18 Wall., 156; *Re Marcuard*, 20 Wall., 114; *Burbank* v. *Conrad*, 96 U. S., 291; *Conrad* v. *Waples*, 96 U. S., 279; *Avegno* v. *Schmidt*, 113 U. S., 293; *Risley* v. *Phenix National Bank*, 83 N. Y., 318; aff'd 111 U. S., 125).

This rule was applied in a variety of cases. It was held that where there was a mortgage on the property confiscated the confiscation was good only subject to the mortgage (*Day* v. *Micou, supra; Avegno* v. *Schmidt, supra*); and that confiscation proceedings were not good even as against an *unrecorded* deed of the property seized, the court holding that the recording acts were for the benefit of *bona fide* purchasers and did not inure to the benefit of the United States in confiscation proceedings (*Burbank* v. *Conrad, supra*).

In *Day* v. *Micou, supra,* at page 161, the court said:

> "It is insisted, however, the Supreme Court of Louisiana erred in holding that the property condemned and sold remained in the hands of the purchaser at the sale, subject to the mortgage given in 1858 to the ancestor of the defendants in error. The argument rests upon a misconception of the Act of 1862. That act, for the purpose of insuring the speedy termination of the rebellion, authorized the seizure of all the estate and property, money, stocks, credits and effects of six classes of persons described in the fifth section. The persons designated in those several classes were either officers in the army or navy of the rebels in arms against the government of the United States, or officers of the so-called Confederate States, or agents thereof, or officers or agents of some one of the States of that confederacy, or persons who gave aid and comfort to the rebellion. So the sixth section directed the seizure of all the estate and property of the persons described in that section. It was not *any* property in which the persons described in these two sections might have an interest that was made subject to seizure, but it was *their* estate and property, *their* interest in it, whatever that interest might be. The act manifestly contemplated no seizure of anything more than that which belonged to the offending person • • •." (Italics the Court's.)

In *Re Marcuard, supra,* at page 115, the court said:

> "It was only the right of John Slidell, whatever that right was, that could be condemned and sold, and the sale under the judg-

> ment of condemnation in no degree disturbed their liens. By the decree of condemnation the United States succeeded to the position of Slidell, and the sale had no other purpose or effect than to make the thing confiscated available for the uses designated by the Confiscation Act."

In *Burbank* v. *Conrad*, *supra*, at page 293, the court said:

> "The United States acquired by the decree, for the life of the offender, only the estate which at the time of the seizure he actually possessed; not what he may have appeared from the public records to possess, by reason of the omission of his vendees to record the act of sale to them; and that estate, whatever it was, for that period passed by the marshal's sale and deed; nothing more and nothing less."

In *Conrad* v. *Waples*, *supra*, the court said, at page 285:

> "It was at the estate and interest which belonged to the offending persons of the classes mentioned that the act aimed, nothing more."

The case of *Kirk* v. *Lynd*, 106 U. S., 315, decided under the Act of 1861, is clearly distinguished by the fact that that Act, as we have already seen (*supra*, p. 42), made property the offender and forfeited it because of its hostile use (see Opinion, p. 317).

The Alien Property Custodian sought in the Circuit Court of Appeals to distinguish the cases cited by us on the ground that the procedure provided by the Civil War confiscation acts is claimed to be

different from that provided by the Trading with the Enemy Act. But even were this claim true, it would have no bearing on the substantive features of the Acts, which are almost word for word identical. At least on questions of *substantive* law, the Civil War cases are authorities squarely applicable to the case at bar.

DECISIONS UNDER THE BRITISH TRADING WITH THE ENEMY ACT.

The decisions under the British Trading with the Enemy Act are also to the effect that the Custodian is vested only with such interest as the enemy possesses.

The British Trading with the Enemy Amendment Act, 1914, Section 4, subsection 1, provided:

> "The High Court or a judge thereof may, on the application of any person who appears to the Court * * * to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy * * * by order vest in the custodian any such real or personal property as aforesaid."

Re Ruben (1915), 2 Ch., 313, was an application under this provision for an order vesting certain insurance policies in the British Custodian

A British firm had deposited the policies with an alien enemy as security for certain bills of exchange which he had accepted in their behalf. The firm subsequently became bankrupt. One of the partners having died and the insurance money on two policies having become payable, the trustee in

bankruptcy prayed for an order vesting the two policies in the Custodian. The motion was denied, the court holding that all that could be vested in the Custodian was the enemy interest in the policies. The argument is so applicable to the provisions of our own Act that we quote it at length:

> "But there is another objection to the summons which goes to the root of the whole matter. In my opinion the applicant is not interested in anything which by the order can alone be vested in the custodian and is not in a position to make the application at all.
>
> "I arrive at this conclusion on a consideration of the general scope of the Act. *A careful perusal of it shows that it is concerned, and concerned only, with enemy property; that is the plain effect of the Act as a whole.*
>
> "First, if one looks at the preamble, it recites that 'it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as "enemies"), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies.' Thus, in the preamble the only property referred to is property belonging to enemies. Again, when one looks at s. 1, which deals with the constitution of the office of custodian of enemy property, one finds that the custodian is appointed 'for the purpose of receiving, holding, preserving, and dealing with such property as may be paid to or vested in him in pursuance of this Act.' Proceeding to

ascertain what that property is one finds in s. 2, sub-s. 1, that the property payable to the custodian is 'Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits.' So the only thing to be paid to the custodian is money which but for the war would have been payable and paid to or for the benefit of an enemy. Again, when one looks at s. 3, which requires certain returns to be made to the custodian, one finds that it is expressly provided (subs. 1) that 'Any person who holds or manages for or on behalf of an enemy any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), shall, within one month after the passing of this Act or if the property comes into his possession or under his control after the passing of this Act, then within one month after the time when it comes into his possession or under his control, by notice in writing communicate the fact to the custodian * * *.' So, again that section deals only with property held or managed for or on behalf of an enemy. Then when one comes to s. 4, which is the section now in question, one finds it is provided (sub-s. 1) that 'The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy * * * by order vest in the custodian any such real or personal property as aforesaid.' There again the ap-

plication is to be made either by a creditor or by any person interested in property belonging to or held or managed for or on behalf of an enemy. Also it seems plain that a person 'interested' there means a person interested under the enemy and not a person claiming adversely to the enemy. Proceeding further with the Act one finds in s. 5, sub-s. 1, 'The custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct.' That is to say that there are directions in s. 5 as to how the property so vested in the custodian shall be dealt with. And it being thought desirable to make some provision for payment before the termination of the war of debts of the enemy out of his property vested in the custodian, it is by sub-s. 2 provided: 'The property held by the custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the custodian may, if so authorized by an order of the High Court or a judge by whose order any property belonging to an enemy was vested in the custodian under this Act, or of any Court in which judgment has been recovered against an enemy, pay out of the property paid to him in respect of that enemy, the whole or any part of any debt due by that enemy and specified in the order.' So again the property vested in the custodian is property of an enemy out of which by virtue of a proper order his debts may be paid.

"It appears, therefore, on a consideration of these sections of the Act that all that can

be vested in the custodian is enemy property, and it is in the property of an enemy that an applicant other than the custodian must be interested. *The applicant here is not interested in any enemy property; he claims that the whole property is his own and that no part of it is the enemy's, and even if it be the fact that the enemy has a lien on the policy moneys which lien might be the subject of a vesting order, still the applicant is not interested in that lien; his interest is an interest against and in derogation of it.*"

Here, again, the Custodian attempted to distinguish the case on the ground that *the procedure* provided by the British Act differs from that provided by the Act involved in our case. But the question we are considering is one not of procedure, but of substantive law. As appears from the above quotation, the *substantive* features of the British Act are almost identical with ours.

Section 8a of the Act does not conflict with our interpretation of Section 7c of the Act. On the contrary, it confirms it.

The contention has been made that the claimants are mere lien holders; that Section 8a of the Act gives to certain classes of lien holders the right to retain possession; but that since the claimants are not within the class specified, they are, under the rule "*Expressio unius est exclusio alterius*," disqualified from retaining possession as against the Custodian.

This contention was rather summarily disposed of by the Circuit Court of Appeals on the ground

that the claimants are "trustees with active duties, and not lien holders within the meaning of the section at all" (Opinion, p. 86).

There are two other sufficient answers to this contention. The first is that the history of Section 8a clearly shows that it was never intended to limit any rights against the Alien Property Custodian, but merely to confirm existing rights against him, and to create new ones. The second is that, if the claimants were lien holders, they would fall within the very class protected by Section 8a.

Section 8a as originally proposed reads as follows:

> "That any person not an enemy or ally of enemy holding a mortgage, pledge, or lien on or other right in the nature of security in, property of an enemy, or ally of enemy, may, after default, dispose of said property, under such rules and regulations and after such notice as the Secretary of Commerce, with the approval of the President, shall prescribe; and such notice shall have in all respects the same force and effect as if duly served upon the enemy, or ally of enemy, personally; *Provided*, that no such rule or regulation shall require that notice shall be given in any case in which by law or by the terms of the contract by which said mortgage, pledge, lien, or other right was created, no notice was, prior to the passage of this Act, required; and that in case whether by law or by the terms of such contract notice is required, no longer period of notice is or shall be required; *And provided further*, that if on any such disposition a surplus shall remain after the satisfaction of such

> mortgage, pledge, lien or other right in the nature of security, notice of that fact shall be given to the Secretary of Commerce pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to the further order of the Secretary of Commerce" (Senate Committee Hearings, p. 15, line 16, to p. 16, line 12).

The meaning and effect of this provision as so drafted is tolerably plain. Its purpose is simply to provide that where an American citizen holds a lien on enemy property which may be foreclosed upon notice, or is a party to a contract with an enemy which may be terminated by notice, the citizen may serve such notice on the Alien Property Custodian with the same force and effect as if it had in peace time been served on the enemy. Nothing was said in the section as originally drafted about continuing to hold such property, because everyone assumed that no such provision was necessary. It was understood by everyone in the consideration of the Act that it was not intended to seize any greater right than the enemy himself possessed. There was no need of providing, therefore, that the holder of a lien on enemy property might continue to hold the property; because the Custodian being vested only with such interest as the enemy had, and that interest not including the right to divest the possession of the American lienholder, the lienholder clearly had the right to continue to hold; so that no express provision was necessary in his favor.

Section 8a was amended because Mr. J. G. Boston, representing the New York Stock Transfer Association, appeared before the Senate Committee and asked that it be amended for the protec-

tion of his clients. In the memorandum he submitted on this subject Mr. Boston said (Senate Committee, p. 59):

> "*This amendment is proposed in order to make clear what we believe to be the real meaning of section 8* and to remove a doubt which might otherwise arise whether the provisions of section 8 were not to a certain extent in conflict with the provisions of section 7 (c). As the act now stands, it might be interpreted as safeguarding the mortgagee, pledgee, or lienor only after and to the extent that the Secretary of Commerce should refrain from exercising in respect to the mortgaged or pledged property the powers conferred by section 7 (c), whereby he may require that property or money owing to or belonging to enemies shall be transferred and delivered to the alien-property custodian. *We do not believe that this is the intent of Congress, and we do not believe that it lies within the power of Congress to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of this act as an incident to his mortgage, pledge, or lien.* But as the act now stands we know that in many quarters it has created a sense of uneasiness and insecurity. This will be removed by the adoption of the proposed amendment" (Senate Committee Hearings, p. 59).

It will be observed that Mr. Boston was of the opinion that even in the absence of the provision he sought, property on which there was a valid possessory lien in favor of an American citizen could not be seized by the Alien Property Custodian. He desired the amendment simply from excess of caution in order to make certain the protection of his clients.

Mr. Warren, who drafted the bill, was of the same opinion; for in accepting the amendment he said (p. 160 of Senate Committee Hearings):

> "In section 8 the insertions in lines 16 and 19 on page 13 are amendments desired by Mr. Boston and *do not affect the bill in any way*. I think they are desirable."

This statement could only mean that it was the opinion of Mr. Warren that the insertion of the words "may continue to hold said property" did not affect the meaning of the bill in any way, because even without them the holder of the possessory lien could not be divested of that lien by the Alien Property Custodian.

The Section was thereupon amended to the following form, in which it was adopted:

> "Sec. 8 (a). *That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property and after default, may dispose of the property* in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and

under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required; *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

The history of Section 8a, then, is that it was drawn up for the purpose of giving parties who had contracts or liens terminable on notice to an alien enemy someone upon whom their notice might be served. Its intention was simply to afford relief to American citizens who would otherwise be deprived of their contractual right of maturing obligations or terminating contracts by service of a notice on the alien enemy. There was no provision with regard to continuing to hold property on which there was a lien because it was understood by everyone that no such provision was necessary—that the true intent of the Act was to leave all rights of American citizens unimpaired, and to vest

the Custodian only with the rights of the enemy. Nevertheless, one class of lienors, in order to make assurance doubly sure, prevailed upon Congress to amend the bill by inserting a specific provision that they should be entitled to continue to hold property on which they had a lien. It was understood by everyone, including the drafter of the bill, that the insertion of this provision did not affect the meaning of the bill in any way.

It would certainly be a grotesque result if the consequence of the insertion of this provision were to destroy the construction of the Act assumed by everyone in Congress at the time of its passage, and to extend by indirection the plain meaning of Section 7c of the Act.

Furthermore, if the claimants were lien holders, they would be within the precise class covered by Section 8a. That Section provides that any lienor who may dispose of his security on notice, presentation or demand, may invoke the protection of the Section. The libellant argued below, and District Judge AUGUSTUS N. HAND held, that this provision also included lienors who had the right to dispose of their security *without* notice, presentation or demand, in order to avoid the absurdity of holding that a pledgee who had the right to sell his pledge on notice might continue to hold the pledge as against the Alien Property Custodian, while one who had the greater right to sell *without* notice would be compelled to turn it over. This conclusion was placed upon the ground that "the greater includes the less." But if this construction is correct, the case at bar *is* a case within the exact terms of Section 8a. The lien in the case at bar is *not*,

like an agister's lien, a right merely to hold. In the case at bar the trustees are, under the express provisions of paragraph FOURTH of the trust deed (p. 24), authorized to dispose of the property constituting the trust fund without any notice, presentation or demand. It is true that an admission of liability or judgment of a court is necessary in order to mature the obligation to secure which this fund is created; but the mere fact that the obligation must be matured certainly cannot be a bar to the trustees' right to hold the securities; for if it were, then every ordinary mortgage having a definite time to run (and the Section expressly protects mortgages) would be without the protection of Section 8a. Moreover, Judge HAND expressly recognized that under the law as enacted, "ordinary mortgages" may be "enforced in the customary way," *i. e.*, by foreclosure (Opinion, p. 83); and this method of enforcement, even after maturity, requires a decree of a court before the security can be disposed of. It follows, therefore, that the trustees in the case at bar are within the class of lienors protected by the provisions of Section 8a.

But the truth of the matter is that it is quite immaterial what persons are entitled to the protection of Section 8a; for the protection of that Section is never necessary. Any person who entitles himself to its protection would be entitled to hold as against the Alien Property Custodian without it. The legislative history of the Section clearly shows that its purpose is to create the Alien Property Custodian the representative of the enemy for the purpose of receiving notices, presentations and demands; not to give the right to retain possession

as against the Alien Property Custodian to anyone who did not already have that right. And, in any event, the claimants "are not lien holders within the meaning of the section at all," but "trustees with active duties" (Opinion of Circuit Court of Appeals, p. 96).

CONCLUSION.

We have shown in this brief that the claimants, as trustees under the declaration of trust and the Connecticut statute, are under a duty to retain possession of the securities as long as there are in this country any outstanding policies of insurance of the Munich Re-Insurance Company and that the Munich Re-Insurance Company had no right to demand possession, or to take any steps with respect to the securities to the disadvantage of these American policy holders. We have shown that under the Trading with the Enemy Act the Alien Property Custodian is entitled to take over only the enemy's interest in the property, and not the interest of non-enemy persons. He acquired, therefore, by his seizure of the property, only those rights which the Munich Re-Insurance Company had. It follows that he did not acquire the right to possession, but that the right to possession remained, where it was before, in the trustees under the declaration of trust.

Such being the substantive law of the case, we believe we have shown how contrary to American constitutional principle, and how inconsistent with the language and purpose of the statute, is the claim of the Alien Property Custodian that his own determination, contrary to law and fact, never-

theless gives him a right to take possession of property which Congress never intended to bring within the scope of his jurisdiction.

We have intentionally refrained from dwelling upon the peculiar hardship to the American policy holders whose interests claimants represent, if the trustees are deprived of their rightful control over the trust fund. In taking out insurance, these policy holders were entitled to rely upon the trust fund, and upon the American citizenship of the trustees, to protect them in the event of war with Germany. If libellant's contentions are sustained, they may find the fund in the hands of a Government official, who will satisfy their claim only after an expensive litigation. Or perhaps they will find that he has delivered it upon *ex parte* application to irresponsible parties whose claims they have had no opportunity to contest in a court of law. We recognize that in time of war incidental hardships will arise in the administration of the most beneficent law, and if our clients were the only persons deprived of their just rights by the libellant, we would not so confidently assert that his construction of the law was erroneous. But the policy holders for whom the claimants are trustees are not the only American citizens whose rights will be imperilled. If the libellant is right, any person, however clear his citizenship and his loyalty, however large or however small his interest, may be deprived by administrative fiat of the possession and control of his property, and compelled to waste his substance in expensive litigation in pursuit of an uncertain and perhaps illusory remedy. We rest our argument on the broad ground that Congress had neither the power nor the intention to

depart so widely from the constitutional principles heretofore declared by this court.

The judgment of the court below should be reversed, and the Marshal directed to return possession of the securities to the claimants.

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APPENDIX 1.

Provisions of the Trading with the Enemy Act and amendments thereto referred to in this brief.

PROVISIONS OF THE ORIGINAL ACT (Act of October 6, 1917; 40 Stat., 411).

"(7-c) REQUIRING PROPERTY CONVEYED TO ALIEN PROPERTY CUSTODIAN. If the President shall so require, any money, or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

"(8-a) CONTRACTS, MORTGAGES, OR PLEDGES AGAINST OR WITH ENEMY OR ALLY OF ENEMY. Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract, with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on

the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally; Provided, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract notice is required, no longer period of notice shall be required: Provided further, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

"(9) CLAIMS TO PROPERTY, TRANSFERRED TO ALIEN PROPERTY CUSTODIAN. Any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the

Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this

Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the alien property custodian under section ten hereof.

"(12) PROPERTY TRANSFERRED TO ALIEN PROPERTY CUSTODIAN. All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter pro-

vided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

"The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

"The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights

which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

"Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

"After the end of the war any claim of an enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: Provided, however, that on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the

alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: And provided further, that the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

"(16) OFFENSES, PUNISHMENT, FORFEITURES OF PROPERTY. Whoever shall wilfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

"(17) RULES BY DISTRICT COURTS: APPEALS. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and

all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary.'"

AMENDED SECTIONS.

"(7-c) REQUIRING PROPERTY CONVEYED TO ALIEN PROPERTY CUSTODIAN. If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording convey-

ances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be lim-

ited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." (Amendment of November 4, 1918; 40 Stat., 1020.)

"(9) CLAIMS TO PROPERTY TRANSFERRED TO ALIEN PROPERTY CUSTODIAN. Any person not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or

if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated * * *.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the alien property custodian under section ten hereof." (Amendment of July 11, 1919; 41 Stat., 35.)

"(12) PROPERTY TRANSFERRED TO ALIEN PROPERTY CUSTODIAN. All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custo-

dian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

"The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof, and make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: Provided, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall

have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

"Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the

United States Treasury, shall be settled as Congress shall direct: Provided, however, That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by such custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: And provided further, That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee." (Amendment of March 28, 1918; 40 Stat., 460.)

APPENDIX 2.

Connecticut statutes relating to foreign insurance companies.

"Sec. 3518. TERM 'FOREIGN INSURANCE COMPANY' DEFINED. The term 'foreign insurance company' shall include any company, corporation, association, partnership, or individual of any foreign country doing insurance business in this state.

"Sec. 3519. WHEN FOREIGN FIRE INSURANCE COMPANY MAY TRANSACT BUSINESS HERE. No foreign fire insurance company shall take risks in this state unless it has a cash capital of two hundred thousand dollars, and shall have made a deposit with the treasurer of this state or with the proper officer of some other state of not less than two hundred thousand dollars in securities authorized by law for investments by savings banks, in trust for the benefit of its policy-holders in the United States; and no policy issued by such company to any citizen of this state shall be invalidated by the occurrence of hostilities between the government of the United States and the government under the laws of which it was organized.

"Sec. 3520. INFORMATION TO BE FURNISHED COMMISSIONER. Every foreign insurance company shall, before admission to do business in this state, furnish to the insurance commissioner a copy of its charter or articles of association, of its last annual report made in the country where it was organized, and the certificate of the officer holding in trust said deposit of two hundred thousand dollars stating the manner in which the same is invested and the purposes for which the same is held; and it shall furnish annually

to the insurance commissioner a statement of the condition of its affairs in the United States, in such form as he shall require.

"Sec. 3521. AMOUNT OF CAPITAL, HOW ESTIMATED. The capital of every such foreign insurance company shall, for all the purposes of the insurance laws of this state, be the aggregate value of its money or securities deposited as aforesaid, and all sums loaned on real estate security in any state in the United States, in conformity with the laws of such state providing for the investment of the assets of insurance companies therein, and all other assets in the United States in which fire insurance companies organized under the laws of this state may invest; *provided* such real estate securities and assets shall be held in the United States by trustees who are citizens of the United States approved by the insurance commissioner, for the benefit of all its policy-holders and creditors in the United States, after making the same deduction from such aggregate value for losses and liabilities in the United States, and for premiums upon risks therein not expired, as is authorized or required by the laws of this state, or by the regulations of its insurance department, with respect to fire insurance companies organized under the laws of this state.

"Sec. 3522. APPOINTMENT OF TRUSTEES. The trustees referred to in Sec. 3521 shall be appointed by the directors of such company, and a certified copy of the vote by which they are appointed and of the deed of trust shall be filed in the office of the insurance commissioner; and he may examine such trustees or the agents of such company, under oath, and its assets, books, and accounts, in the same manner as he may examine the officers, agents, assets, books, and accounts

of any company authorized to do fire insurance business in this state.

"Sec. 3523. CONDITIONS PRECEDENT TO TRANSACTION OF BUSINESS. No foreign insurance company, or agent or attorney thereof, shall transact the business of fire insurance in this state until such company shall have complied with the laws of this state relative to foreign insurance companies, and received a license or certificate of authority from the insurance commissioner; nor shall such companies make contracts of insurance on property in this state except through lawfully constituted and licensed resident agents.

"Sec. 3524. LIMITATION OF RISKS. No foreign insurance company shall insure against loss by fire or inland navigation, nor expose itself to any such loss by any one risk, for any greater amount in proportion to its capital than companies which are organized under the laws of this state.

"Sec. 3569. EXAMINATION OF AFFAIRS AND NESS. When a foreign insurance company shall have complied with the provisions of law relating to such companies, and the insurance commissioner is satisfied that it is solvent in the United States, he may issue to it a license to transact business in this state, upon the payment of thirty dollars for filing a certified copy of its charter or deed of settlement, and annual fees as follows: license fees, fifty dollars; fee for filing statement, twenty dollars; and two dollars for each agent's certificate of authority.

Sec. 3569. EXAMINATION OF AFFAIRS AND OFFICERS. The insurance commissioner, either personally or by a committee appointed by him, consisting of one or more persons not directors, officers, or agents of any fire or fire

and marine insurance company doing business in this state, may at any time examine into the affairs of any fire or fire and marine insurance company incorporated by or doing business in this state. The officers or agents of such company shall exhibit its books to said commissioner or committee, and otherwise facilitate such examination; the commissioner or committee may examine under oath the officers and agents of any such company in relation to its affairs. Said commissioner may publish the result of such investigation in one or more newspapers published in this state. In relation to the affairs of any company incorporated by or organized under the laws of any other state of the United States, he may, in lieu of such investigation, accept the certificate of the insurance commissioner or superintendent of such state, as to its condition. Whenever the commissioner shall ascertain that the assets of any fire or fire and marine insurance company incorporated by this state, after deducting for reinsurance and its other proper liabilities, excepting capital, amount to less than three-fourths of its capital stock, if it have a stock capital, or in the case of a mutual company, if the assets, less the unsettled claims and other absolute liabilities, amount to less than three-fourths the sum requisite for reinsurance, he shall call upon it to make up such deficiency within such reasonable time as he shall fix, and on failure to comply with such requirement shall bring his petition to a judge of the superior court, praying for an injunction restraining said company from the further prosecution of the business of making or renewing insurance until said deficiency is made up; and if, upon a hearing before said judge, after such reasonable notice to such company as may be ordered,

the allegations contained in such petition shall be found true, such judge shall issue such injunction.

"Sec. 3500. LIMITATION OF RISKS TAKEN BY COMPANY. No fire insurance company doing business in this state shall expose itself to loss on any one risk to an amount exceeding ten per cent. of its paid-up capital and surplus.

"Sec. 3599. REVOCATION OF CERTIFICATE. When the insurance commissioner shall find that any insurance company not incorporated by this state is unsound, estimated in the manner prescribed in Sec. 3509, he shall revoke its license and cause notice thereof to be published at least one week in two daily newspapers, printed, one in Hartford and one in New Haven; and he may reissue such license when he shall be satisfied of the soundness of such company; no agent of such company shall, after the first publication of such notice, issue or renew any policy of insurance in its behalf."

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JAMES D. MAHER
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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

TWO CASES, NOS. 324 AND 325.

J. MARKHAM MARSHALL, WALTER T. ROSIER, AND RUDOLPH MEYER, AS TRUSTEES, ETC., PLAINTIFFS IN ERROR,

v.

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE DEFENDANT IN ERROR.

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Proposition II. The facts set forth in the answers confirm the determination of the custodian and justify his demand. These facts, if true, establish that the securities libeled belonged to or were held for the Munich Reinsurance Company, within the purview of section 7 (c); that although policyholders and creditors of that company, within the United States may have an interest in the nature of security therein, such interest is not within the scope of section 8 (a); and therefore, that the custodian is entitled to possession of these securities, leaving the protection of whatsoever rights these creditors and policy holders, or these claimants on their behalf, may have to the remedies provided by section 9— 64

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

J. MARKHAM MARSHALL, WALTER T. Rosen, and Rudolph Metz, as Trustees, etc., plaintiffs in error.
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY Custodian, defendant in error.

Two cases, Nos. 394 and 395.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

I. NATURE OF THE ACTION.

These two cases come to this court on writ of error to the Circuit Court of Appeals for the second circuit from a decree affirming a decree of the District Court for the Southern District of New York rendered in favor of the Alien Property Custodian, libellant in that court. The actions are proceedings in the nature of a libel proceeding instituted, pursuant to the provisions of section 17 of the Act of Congress known

as the Trading with the Enemy Act (40 Stat. L. 411) by the Alien Property Custodian, for the purpose of effecting seizure of certain specifically described securities determined by the Alien Property Custodian, after investigation, to belong to or to be held by, for, on account of, on behalf of, or for the benefit of the Munich Re-insurance Company, a German corporation, and therefore an enemy within the purview of said Act.

All page references herein, unless otherwise stated, will be to the transcript of record in case No. 394.

II. The Facts.

The libels of information are brief, setting forth merely the determination made by the Alien Property Custodian with respect to the securities in question, and that pursuant to said determination he had required such property to be transferred, assigned, and delivered to him; that his demand had not been complied with, and that the securities were physically within the jurisdiction of the District Court. Upon the filing of the libel an order was issued to the marshal directing him to take possession of the securities libeled; monition was duly issued, publication made, and thereafter plaintiffs in error filed claim and subsequently an answer. The answer is long, sets up much that is immaterial, and in many respects is inconsistent with itself. It denies in one place that the Alien Property Custodian made any investigation previous to the making by him of the

determination recited in the libel (paragraph 2 of answer, p. 12) and later avers that all of the facts with respect to the ownership of the property in question were undisputed and were known to the custodian (paragraph 35 of answer, p. 21). It denies that the securities libeled were the property of the German insurance company (paragraph 36 of answer, p. 21) and then avers that the Alien Property Custodian could not seize them because the claimants as trustees had an interest in the nature of security in the property libeled which was protected by the provisions of section 8 (a) of the Act (paragraph 34 of answer, p. 20).

The material facts set up in the answers are: That pursuant to certain statutes of the State of Connecticut the Munich Re-insurance Company, a German corporation, in the year 1911 executed an instrument called a deed of trust, by the terms of which three individuals, American citizens, were appointed trustees to hold certain securities listed in the deed of trust and such additions thereto and substitutions therefor as might thereafter be made; that the present claimants are successors to the original three trustees; and that the securities libeled constituted the corpus of this so-called trust at the time of the custodian's determination and demand. No personal interest in or claim to these securities is disclosed or asserted and the refusal to comply with the custodian's demand is claimed to be justified upon the ground that the statute vests no right in

the custodian to the securities, and delivery by the trustees pursuant to his demand would leave them subject to liability toward policyholders and creditors for whose benefit it is claimed the trust was created.

In considering the effect to be given these facts and the many other immaterial averments of the answer there should be kept in mind the legislative and executive treatment of enemy insurance companies from the declaration of war up to the cancellation of Treasury licenses on November 14 and 15, 1918.

On April 6, 1917, contemporaneously with the declaration of war against Germany, a proclamation was issued by the President, by the terms of which proclamation enemy insurance companies were authorized to continue the transaction of their business in the United States subject to rules and regulations that might be prescribed by the insurance supervising officials of the State in which the principal office of such foreign company in the United States might be located (Exhibit 2 of answers, pp. 26–27). Pursuant to this proclamation the Insurance Commissioner of the State of Connecticut, in which State the Munich Company had its principal office in the United States, issued certain rules and regulations (Exhibit 3 of answers, pp. 27–29).

After the passage of the Trading with the Enemy Act, applications were made on behalf of the Munich and other enemy insurance companies, pursuant to

section 4 of the Act, for license to continue to write business in the United States. After hearings, the Secretary of the Treasury, exercising the power of the President, issued licenses, not to continue the business within the United States, but to liquidate the same. Liquidation not proceeding satisfactorily, the President, by Executive Order No. 2991, dated November 12, 1918, authorized the Alien Property Custodian to take over and administer the business, property, and assets of enemy insurance companies not holding a license, including power to collect premiums, accounts, etc., and to pay claims, premiums, and other accounts and liens or charges. A copy of this order is attached as Appendix B.

On November 14, 1918, the license which had been issued to the United States managers for the Munich company was cancelled, and on November 18, 1918, demand was issued for all of the property and assets held or employed in the United States on behalf of the United States department of the Munich Re-insurance Company (Exhibit 5 of answers, pp. 31–32) and on March 7, 1919 (Exhibit 9 of answers, pp. 40–41), a demand particularly itemizing and describing securities herein involved, was issued by the custodian. Since November 18, 1918, the Alien Property Custodian has been actively liquidating the business of the Munich company.

III. Contentions of the Parties.

The contention on behalf of the Alien Property Custodian is that these are actions brought for the purpose of enforcing demands lawfully made and that the issue is possession, not title. It is asserted that the Trading with the Enemy Act constitutes a comprehensive plan for the capture of enemy property after executive rather than judicial determination of its enemy character; and that the demand of the custodian made pursuant to determination after investigation is conclusive in so far as the right of possession is concerned, the only remedy left to persons asserting claims adverse to such determination and demand being that provided by section 9 of the Act.

However, even if this construction of the Act be unsound, the custodian in this case is entitled to possession because the facts set forth in the answer confirm the determination of enemy ownership and justify the demand. The facts set forth in the answer, as distinguished from the mere assertions or conclusions, establish ownership of the libeled securities in the Munich Re-insurance Company although subject to a right in the nature of security in policy holders and creditors of the company within the United States; and such right being clearly not within the scope of section 8 (a) does not entitle the policy holders and creditors or these claimants on their behalf, to retain possession of these securities, their remedy being an action under section 9 of the

Act to impress upon these securities in the hands of the custodian whatever lien or right of security exists in their favor.

Both of these contentions are sustained by the opinion of the Circuit Court of Appeals. (*Garran* v. *Bonds*, 265 Fed., 477; transcript, p. 92.)

The argument now advanced on behalf of plaintiffs in error appears to be: First, that this court must consider not merely the question of possession, but the rights of the parties upon the merits; and, second, that upon the facts which they claim to be undisputed the Alien Property Custodian is not entitled under the provisions of the Trading with the Enemy Act to possession of these securities. Although apparently abandoning many of the arguments set up in their answer and advanced in the District Court it is still somewhat uncertain upon just what ground their contention really is made. They appear still to argue that ownership of these securities was not in the Munich company and at the same time to contend that section 8 (a) of the Act covers the situation. The great weight of their argument, however, appears to rest upon the proposition that the Alien Property Custodian is a mere assignee of the enemy and that, as the enemy insurance company could not itself have taken the possession of the securities from these claimant trustees, the Alien Property Custodian is in no better position.

IV. Propositions.

The case on behalf of the Alien Property Custodian therefore is submitted upon the following propositions:

1. The only issue properly presented by the pleadings in these cases is the right to possession of the securities libeled; questions of title are not involved; and the demand of the Alien Property Custodian made pursuant to determination after investigation is conclusive herein.

2. The facts set forth in the answers confirm the determination of the custodian and justify his demand. These facts establish that the securities libeled belonged to or were held for the Munich Reinsurance Company, within the purview of section 7 (c); that, although policy holders and creditors of that company within the United States may have an interest in the nature of security therein, such interest is not within the scope of section 8 (a); and therefore that the custodian is entitled to possession of these securities, leaving the protection of whatsoever rights these creditors and policy holders (or these claimants on their behalf) may have, to the remedies provided by section 9.

3. The decrees of the District Court appealed from were correct and should be affirmed.

ARGUMENT.

PROPOSITION I.

The only issue properly presented by the pleadings in these cases is the right to possession of the securities libeled. Questions of title are not involved, and the demand of the Alien Property Custodian, made pursuant to determination after investigation, is conclusive herein.

1. *General plan of the Trading with the Enemy Act.*

The Trading with the Enemy Act and the various amendments constitute a complete and comprehensive plan for effecting the capture of enemy property within the United States.

The authority for the enactment of these statutes is found in Article I, section 8, of the Constitution, wherein, among other things, it is provided:

> That Congress shall have power * * * to provide for the common defense and general welfare of the United States * * * to declare war, grant letters of marque and reprisal and make rules concerning capture on land and water; * * * to raise and support armies * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all powers vested by the Constitution in the Government of the United States or in any department or office thereof.

In so far as these cases are concerned, there is no limitation upon the powers so granted other than

the provisions of the fifth amendment to the Constitution, reading as follows:

> Nor shall any person * * * be deprived of life, liberty, or property without due process of law.

The Trading with the Enemy Act as passed and approved October 6, 1917, is rather long, and applies to matters other than the mere capture of enemy property. It prohibits trading with the enemy, as well as for the enemy, and defines what shall constitute such trading; provides for censorship of the mails, and prohibits communications, except through the regular course of the mails; regulates dealing in foreign exchange; and, in addition, provides a system by which, under license, enemy property within the United States may remain in the hands of the persons intrusted by the enemy owners with the custody or management thereof. For the purpose of discussion of these cases, the pertinent sections of the act appear to be the following:

Section 2, defining the word "enemy" as used in the Act, and also the words "to trade"; section 3, making it unlawful, except with license of the President, to trade with, to or for the benefit of an enemy; section 4, authorizing every enemy insurance or reinsurance company doing business within the United States through an agency or branch office, to continue business for thirty days, and thereafter, if licensed so to do by the President;

section 5, authorizing the President to grant licenses containing such provisions and conditions as he shall prescribe, and, in addition, providing that the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct; section 6, providing for the appointment of an official to be known as the Alien Property Custodian; section 7, subsections (a), (c), (d), and (e), requiring reports of enemy property within the United States to be filed with the custodian and authorizing the President, upon investigation, after determination, to require property to be conveyed or delivered to the custodian, and authorizing voluntary transfers and deliveries to the custodian, and providing that payment, conveyance, or transfer to the custodian shall be a full acquittance and discharge of the persons making same; section 8 (a), providing that in certain specified cases any person not an enemy or ally of enemy holding rights in the nature of security in property of an enemy may continue to hold the property; section 9, providing an exclusive remedy by which any person not an enemy or ally of enemy claiming any interest, right or title in money or property delivered to the custodian, may assert such claim, and if unable or unwilling to secure allowance thereof by the President may secure judicial determination thereupon; section 12, granting to the Alien Property Custodian broad powers of administration and, by amendment of March 28, 1918, unlimited power of sale, and, in addition, providing that after the end of the war any

claim of an enemy or ally of enemy to any property held shall be settled as Congress shall direct; section 16, providing penalties for violation of the terms of the Act, specifically including failure or refusal to comply with any order of the President; and section 17, granting to the District Courts jurisdiction to enforce the provisions of the Act, with right of appeal.

By executive orders the President created a board known as the War Trade Board, to which was granted the general power of issuing licenses; but the power of issuing licenses for the continuation of the business done by American branches of enemy insurance companies was vested in the Secretary of the Treasury; and the power of investigation and determination granted to the President by section 7 (c), together with the power of issuing demands, was vested by the President in the Alien Property Custodian.

The original Act, as is stated in the brief of plaintiffs in error, page 51, provided a benevolent system for the preservation and protection within the United States of enemy property. The Alien Property Custodian was required to preserve and take care of property which had been seized by him; and, as much of this property was in the shape of industrial enterprises in the United States, earning exorbitant war profits, the result would have been to pile up, for the benefit of the German owners after the war, huge profits earned as a result of a war brought on by their own Government. Upon presentation of these facts to Congress, there was passed

on March 28, 1918, an amendment to section 12, granting to the custodian an unlimited power of sale, in place of power to sell merely for the prevention of waste.

To make more effective this power of sale, the Act was further amended on November 4, 1918. Doubts that had arisen respecting definition of the word "property" as used in section 7 (c), and the power of the custodian over shares of stock represented by certificates which he had been unable to locate, but which he had determined to be enemy owned, were settled; and by the provision in this amendment authorizing the custodian to seize property and the provision that the sole remedy and relief of any person having any claim to property transferred or delivered to the custodian, or required so to be, or seized by him, should be that provided by the Act, and that in the event of sale such claimant should be remitted to the net proceeds received and held, the Act was made definitely a procedure against property, rather than against whatever enemy interest there might be in property. The material sections of the Trading with the Enemy Act will be found in the appendix to this brief.

It is at once apparent that the general plan of this Act has no direct precedent, the nearest analogy in American or English legislative enactment being the captured and abandoned property acts of the Civil War period (12 Stat. L., 820). In the past, captures of property on land have, in the main, followed the practice applicable to capture of prizes

at sea; and have provided, not for the taking possession and holding of property subject to future disposition, but for the immediate condemnation by appropriate judicial proceedings. Under that procedure the seizure is merely a preliminary step by which the property is brought within the jurisdiction of some court for judicial determination of its status as lawful prize, and condemnation if found so to be. In fact, until the present war, the tendency for several hundred years had been away from the practice of capturing and confiscating property of the enemy found on land. The remarkable development of international trade, commerce, and investments which had taken place during the half century preceding this war, and the development of international credits, made necessary a change in this practice, if Germany was to be deprived during this war of the power to utilize for purchases in neutral countries credits based upon her investments in the allied countries. These countries, therefore, particularly England, France, Russia, and Italy, all passed legislation by which some public official, holding powers analogous to those of the Alien Property Custodian, was authorized to secure possession of enemy property, and, under certain circumstances, to liquidate enemy investments. No permanent confiscation of enemy property was decreed by any of these countries, the ultimate disposition of the property seized being left for future action.

2. *The determination of enemy ownership made pursuant to the provisions of section 7 (c) is conclusive in so*

far as the custodian's right to possession is concerned; and demands for the possession of property made by the custodian pursuant to this section of the act must be complied with and thereafter judicial determination had with respect to claims of ownership, as provided by section 9.

As originally drafted and submitted to Congress section 7 (c) read:

> If the Secretary of Commerce, by direction of the President, shall so require, any money or other property owing or belonging to an enemy or ally of enemy, or *which the Secretary of Commerce after investigation shall determine is owing or belongs to an enemy or ally of enemy*, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, under such rules and regulations as the Secretary of Commerce shall prescribe. (Senate committee hearings, page 13, line 18, to page 14, line 1.)

Under this first draft it was provided in the alternative (1) that property in fact enemy owned must be delivered; or (2) that property which the Secretary of Commerce after investigation might determine to be so owned must be delivered. Upon the doctrine that the greater includes the less, the first provision of this paragraph was useless. It is also indisputable that under the second alternative it was the determination of the Secretary of Commerce, after investigation, that the property was owing to or belonged to an enemy, and not the existence of that fact in verity, which was made the condition

upon which the property must be paid or delivered to the Alien Property Custodian.

In committee it was changed and as passed and approved on October 6, 1917, read:

> If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

At first glance the language of this section appears ambiguous, in that there may be some doubt whether it means:

(*a*) That property which in fact is enemy-owned and which the President after investigation determines is enemy-owned, shall be delivered and paid to the custodian; or

(*b*) That any property which the President after investigation determines is enemy-owned must be delivered or paid over to the custodian.

There is nothing in the facts under which the change to the present form was made which indicates any intention to make the Act less stringent; and there is in fact no other construction which reasonably can be placed upon this section as it was enacted, other than that here contended for. If the determination of enemy ownership made by the President after investigation does not conclusively settle his

right to the possession of the property, then those words in the section reading "which the President after investigation shall determine is so owing, or so belongs, or is so held," are surplusage, and the Act means the same as if this language had been omitted. The Act would then read:

> If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

It is a well-established rule of construction that unless otherwise necessarily required, all of the words of a statute shall be given some force and meaning. Although perhaps somewhat awkwardly expressed, this section can be construed only to the effect that for the purposes of this action it is the executive determination of enemy ownership, and not the actual existence thereof, which determines the right of the custodian to possession.

Pursuant to the authority given by section 5 of the Act, the President has vested in the custodian by various executive orders the powers by this section of the Act granted to the President. This, however, does not affect the construction to be placed upon this section; but unless this fact is borne in mind, some confusion may result when the demands are read. In so far as the Alien Property Custodian

makes investigations respecting the ownership of property and issues demands for delivery to himself, he is exercising the power of the President; in so far as he exercises the powers of administration and sale included in section 12 he is exercising the powers granted directly to him by the Act. It is helpful, however, to keep clearly in mind this dual capacity in which he acts.

A considerable portion of the brief of plaintiffs in error is devoted to an endeavor to show that the interpretation (a) is the only one possible (pp. 67 to 73). In fact in this argument (p. 71 of their brief) they go so far as to insist that the last paragraph of the amendment to section 7 (c) in placing money and property required to be conveyed or paid over on a parity with that actually conveyed or paid over merely means that where the custodian's determination of enemy ownership *was correct*, the President's requirement would *in that case only* preclude the demandee from any resistance save such as is contemplated under section 9. Such a construction of this paragraph is in conflict with the entire theory of the Act and would necessarily rob it of all effective power as a war measure. It is obvious that the plaintiffs in error in urging this contention have lost sight of the complete balance struck between sections 7, 9, 12, and 16 of the Act. Section 7 (a) provides for information in the nature of a sworn statement to be furnished to the Alien Property Custodian as to the existence of property held for or on behalf of an enemy. This provision furnishes the President

and the custodian with a predicate upon which a determination of enemy interest or ownership may be made. Section 7 (*c*), as amended, provides that after investigation the President may require the conveyance of, or the custodian may seize such property or interest therein and that "all property thus *acquired* shall be held, administered, and disposed of as elsewhere provided in this Act." The clause last quoted clearly indicates that the issuance of the requirement or the act of seizure, as the case may be, operates to acquire the property, for it considers that the requirement of the President equally with the seizure by the custodian constitutes an acquisition of the property.

Section 7 (*c*), as amended, then provides that the sole relief and remedy of any person having *any claim* to money or other property conveyed, etc., to the custodian, or required so to be, or seized by him shall be that provided by the terms of this Act. Here again the requirement for conveyance or the seizure is placed on a complete parity with actual conveyance to the custodian.

Realizing that, in spite of these broad provisions, many law-abiding citizens might feel afraid to rely solely upon an executive determination of enemy ownership, fearing to subject themselves to pecuniary liability by delivering property of third persons in their hands without a court order, Congress provided in section 7 (*e*) as follows:

> No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation

made by the President under the authority of this Act.

It further provided that a payment or conveyance or delivery made to the Alien Property Custodian "hereunder" shall be full acquittance and discharge for all purposes of the obligation of the person making the same to the custodian; further that the custodian and such other person as the President might appoint might have power to execute, acknowledge, and deliver such instruments as might be necessary or proper to evidence upon the record or otherwise such acquittance and discharge; and further that the certificate of the President appointing a person with authority to execute such acquittance should be recorded by any recording officer in the United States to whom presented, and such record or certified copy thereof shall be received in evidence in all courts within the United States, Federal or otherwise. Could anything be more apparent than that section 7 (e) was enacted squarely to cover such a case as that of these trustees?

Section 7 is, therefore, primarily concerned with the investigation and determination of enemy ownership, the method of its acquisition by the custodian, and the full and complete protection of all persons obeying the orders of the Executive made in that behalf. If the determination of enemy ownership was correctly made, the property is then to await the further determination of Congress under section 12, but if an error has been committed, section 9 provides a complete and adequate remedy for any person not an enemy

or ally of enemy claiming any money or other property conveyed to the custodian and held by him or the Treasurer of the United States. Such right of filing claim is not limited to a claim of ownership but extends to any interest, right, or title.

The interpretation placed upon section 7 (e) as amended by plaintiffs in error not only vastly weakens that particular section but renders well-nigh nugatory the provisions of section 7 (e), for it would place upon persons complying with orders, rules, and regulations made by the President the responsibility of determining the correctness of those orders, rules, or regulations.

That interpretation would make the acquittance given by the custodian under section 7 (e) one in name only unless in the particular case the property involved was in fact the property of an enemy; it would contemplate the placing on record of duly executed instruments by the custodian discharging mortgages and other obligations and still leave the general public to deal with property thus affected absolutely at its peril. Under such circumstances, persons holding the property of others in their possession would surrender such property to the custodian in cases of importance only upon the decision of a court of last resort, and thus bring about a condition where, if the property were of great value, or if the persons holding the same were indisposed to uphold the hands of the Government in prosecuting the war, it would be easy to prolong the litigated contest until any war of average length would be over

and the contending parties perhaps at liberty to return the property to their enemy principals.

As, in many cases, it would be impossible to determine with absolute certainty until after termination of the war whether in fact the property in question was enemy owned, no person, if our adversaries' contention is sound, would be justified in delivering any property to the custodian. Delivery of possession of both real and personal property is not a necessary prerequisite to the transfer of title, and it is not at all improbable that in many instances bona fide transfers by bills of sale or other written instruments were made prior to the declaration of war with Germany. Our opponents' contention would subject to actions by such transferees all persons in the United States in possession of this property, but with no notice of such transfers, who have delivered property or paid money to the custodian. In fact, no doubt, encouraged by the hasty expression of opinion in the *American Exchange Bank* case (*infra*), a number of such actions have been brought in the Supreme Court of New York. So far the trial judges in all of these actions have consistently held that delivery of the property or payment of the money to the custodian pursuant to his demand constitutes a defense to such action, and that the claimants were remitted to an action under section 9 against the custodian. Although these decisions, of course, are in themselves not authority in this court, they illustrate the practical application of the trustees' contention,

and the sound, common-sense reasoning of these trial judges is enlightening.

> *Biesantz* v. *Supreme Council Royal Arcanum*, 175 N. Y. S., 46.
>
> *Wageck* v. *Travellers Ins. Co.*, 177 N. Y. S., 327.

Such an interpretation renders nugatory, or almost so, so much of section 9 as concerns the proceedings by which a nonenemy owner may recover his property. If he or his agent may at will resist the endeavor of the custodian to reduce the property to possession and try out the merits on the question of enemy ownership *in limine*, there would be but small occasion for the carefully devised proceedings of section 9, which permit such claimants to assert their rights either by applying to the President for an Executive allowance of their claims or by filing bills in equity in the appropriate Federal courts.

Further, section 9 of the act does not contemplate the filing of a claim until the property is in the custodian's possession:

> * * * any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property *which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian* hereunder * * * may file with the said custodian * * *.

The omission of the phrase "or required so to be" is significant and evinces the legislative intent that compliance with the presidential requirement must

be had before the claim proceedings are open to the person aggrieved thereby. This distinction between the wording of section 9 and that of sections 7 (c) and 12 as amended is wholly meaningless under the theory of the trustees that the correctness of the Executive requirement may be tested without compliance.

Another *reductio ad absurdum* resulting from the interpretation placed by plaintiffs in error upon section 7 (c) as amended, is to be found in the fourth paragraph of section 12, which, as originally enacted, reads:

> The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession, in pursuance of the provisions of this Act.

On March 28, 1918, this paragraph was amended so as to read:

> The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been *or shall be required to be*, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act.

Thereafter, the President, under authority reposed in him by section 5, promulgated certain additional regulations respecting the duties of the Alien Property Custodian (Executive Order No. 2916, July 16, 1918), among which is the following:

POWERS OF MANAGEMENT AND ADMINISTRATION, INCLUDING SALE OR OTHER DISPOSITION.

> The Alien Property Custodian shall have power, and he is authorized and directed, to hold, manage, administer, protect, preserve, control, and sell, or otherwise dispose of, in accordance with the following rules and regulations, any and all property other than money, which has been or shall be conveyed, transferred, assigned, delivered, and or paid over to him pursuant to the provisions of the Trading With the Enemy Act as amended and the Executive proclamations and orders issued pursuant thereto or which has been or shall be required so to be conveyed, transferred, assigned, delivered and/or paid over to him.

By this amendment to section 12 and the Executive order pursuant thereto the custodian is therefore vested with the duties of a trustee in respect of all property other than money from the time of issuance of his requirement that it be transferred to him; and from that time he is directed by the President to manage, administer, protect, preserve, and sell or otherwise dspose of such property. And yet under our adversaries' contention, his requirement is inoperative unless his determination of enemy ownership is correct, and the correctness thereof any person is at liberty to dispute in any way he sees fit short of a criminal effort to evade the law. Could anything be more unsound?

Section 16 of the Act provides that:

> * * * whoever shall *wilfully* violate any of the provisions of this Act or of any license,

> rule, or regulation issued thereunder, and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, etc. * * *

Under the construction placed on section 7 (c), as amended, by our opponents, and giving full effect to the word "wilfully," this section must be translated as follows:

> * * * whoever shall violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall violate, neglect, or refuse to comply with any order of the President * * * *with knowledge that such license, rule, regulation, or order is based upon a determination of enemy ownership correct in fact and valid in law* shall, upon conviction, be fined, etc. * * *.

In other words, if the potency of the seizure or presidential requirement to convey or pay over is dependent upon the correctness of that determination and not upon an investigation (representing the good faith of the executive branch of our Government), it is apparent that any person indicted under section 16 would only have to assert that he refused to obey the President's order because he thought it was based upon a misconception of the facts or of the law applicable thereto. The impossible burden would then be cast upon the Government of showing that so overwhelmingly clear were the law and the

facts in that particular case that the defendant must be perjuring himself in asserting that he thought the Executive determination was incorrect.

Such a construction would therefore turn any criminal prosecution under section 16 into an interminable litigation involving every question that could be presented to a civil tribunal as a basis for determining the ultimate rights of any possible claimant of the property.

To summarize: It has been shown that our opponents' interpretation of section 7 (c), as amended, is in conflict with the last paragraph of that amendment itself; that it wipes out the provisions of section 7 (e) according protection to loyal citizens obeying the presidential requirements; that it results in making well-nigh useless the procedure for the recovery of property by nonenemy claimants under section 9; that it fails to account for the significant omission of the phrase, "or required so to be" in section 9; that under the provisions of the fourth paragraph of section 12, as amended, it places upon the custodian the responsibility of a trustee for property the possessory title of which remains in the demandee until a final judicial determination on the merits can be had; that it turns into a mockery the criminal provisions of section 16.

The custodian's construction of section 7 (c), as amended on the other hand, as stated by us on page 16 hereof in the paragraph marked (b), harmonizes all of the sections above referred to and gives a simple and effective procedure for placing in the

control of the Government all property which after an executive investigation fairly appears to be enemy owned while preserving to the fullest extent the rights of all nonenemies interested therein to procure a determination of their rights by executive allowance or by decree of a Federal court. (The attention of this court is here directed to the fact that under section 9 the action of the President in refusing to allow a claim does not preclude the claimant from trying the case *de novo* in a Federal court; nor is the claimant obligated to apply to the executive for such allowance at all—it is merely his privilege to do so.) The minor textual redundancy of this amendment—

> any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy * * * which the President after investigation shall determine is so owing or so belonging or is so held * * *

will not, we submit, prevent this court from adopting that construction which alone harmonizes and reconciles the Act as a whole and which gives full effect to each of the sections and subsections whose efficacy is destroyed by our opponents' contention.

The Trading with the Enemy Act differs from the Civil War Confiscation Act of 1862, and the other proceedings above referred to, in that subsequent to the taking possession or capture of the property by the executive, the burden of taking the initiative toward securing judicial determination with respect to the ownership of the property, is placed not

upon the executive official making the capture, but upon the nonenemy claimants. Justification for this is found in the purpose of the proceeding, which, as indicated above, is not to effect confiscation of the property, but simply to secure its possession during the war, to be disposed of after the war as Congress shall direct. It is to be presumed that in the majority of cases, the executive determination will be in accord with the real facts, and to require the institution of judicial proceedings in all cases would be an entirely useless matter, particularly if, after the war, the captured property should be ordered restored to the various owners thereof. Concrete facts speak louder than generalities, and this assertion is supported by the fact that out of the seizure of more than $500,000,000 worth of property determined to belong to over 30,000 different owners, there are now pending an insignificant number of litigated cases instituted under section 9 for the purpose of contesting judicially the executive determination of ownership made prior to seizure. (See report of the Alien Property Custodian for the year 1918, p. 9; and report of the Attorney General for the year 1920, p. 134.)

This Act differs from the English Act and from all previous similar legislation in this country, except the Captured and Abandoned Property Act of the Civil War, in that the vesting of possession and rights of administration, management, and liquidation incident to possession in the present statute

follow an Executive investigation and determination, rather than a judicial proceeding. Congress might have provided machinery whereby a judicial inquiry and determination of enemy ownership should be a condition precedent to delivery of possession to the custodian. The delays incident to such proceedings, however, even when of the most informal character and conducted with the greatest expedition possible, are matters of common knowledge. No other illustration than this particular case need be given. The record here shows that the libel was filed on the 8th day of March, 1919, final decree entered on the 6th day of October, 1919, decree of the Circuit Court of Appeals affirming the same on March 16, 1920, and the case is now being submitted to this court in January, 1921, nearly two years after its institution.

It is not intended by the preceding pargraph to convey the impression that the plaintiffs in error have sought vexatiously to delay this proceeding, but merely to show, by illustration, the soundness of our construction of section 7 (c), as amended. This construction, if upheld by this court, will establish a procedure which will fully preserve the rights of the Government and those of possible claimants in a manner at once expeditious, just, and economical.

Capital is made by our adversaries (pp. 45–46 of their brief) of the fact that the amendment of March 28, 1918, gave the custodian an "unlimited" right to sell property. The right of sale even under this amendment is not unlimited as he is required, in respect of such sales, to act "under the supervision

and direction of the President and under such rules and regulations as the President shall prescribe." Furthermore, sales must be by public auction to the highest bidder, after advertisement, at the place where the property is situated. These requirements must not be departed from "* * * unless the President, stating the reasons therefor in the public interest, shall otherwise determine." We submit that these requirements are such as would tend to procure a fair and reasonable price, as it must be assumed that, in the rare case where the President might "in the public interest," authorize a private sale he would do so only when satisfied that private sale would prove more advantageous than public auction, as is indeed not infrequently the case.

Furthermore, it must be borne in mind that the capture of property by the Alien Property Custodian imparts notice to the owner who, if a non-enemy, may then file suit under section 9, which automatically under the provisions of that section, would operate as an injunction to prevent the sale of his property until the suit is terminated.

The right of the custodian to require the issuance of new stock certificates to him in lieu of those formerly belonging to the enemy, as granted by the amendment of November 4, 1918, does not in anywise enlarge the beneficial interest of the custodian or of the Government in the property nor diminish that of private owners. The purpose of the amendment in this respect was, as stated by our opponents (p. 50 of their brief), to make it impossible for the

former owner to transfer to an alleged bona fide purchaser.

3. *This feature of the Act, although in some quarters assailed as radical and contrary to all the principles of the common law, is well justified by precedent.*

The practice on the part of the Government, in proper cases, of taking possession of property and then requiring adverse claimants to take the initiative in instituting proceedings for the judicial determination of their rights and of providing that certain specified remedies shall be exclusive is well sanctioned by legislation in the past which has been sustained as valid.

Since almost the beginning of our Government, it has been the law that all property taken or detained under authority of any revenue law of the United States shall be irrepleviable, and subject only to the orders and decrees of the United States courts having jurisdiction thereof. R. S. sec. 934; U. S. Comp. St. Ann. (1916), sec. 1560. The validity of this provision has been sustained in every decision in which it has been called into question.

Treat v. *Staples*, Fed. Cas. No. 14,162; *Brice* v. *Elliott*, Fed. Cas. No. 1,854; *DeLima* v. *Bidwell*, 182 U. S. 1, 180.

Similar legislation with respect to money collected for customs duties in excess of the amount really due has also been upheld. *Carey* v. *Curtis*, 44 U. S. (3 Howard) 236; *Bartlett* v. *Kane*, 57 U. S. (16 Howard) 263; *Arnson* v. *Murphy*, 109 U. S.

238, 240. In *DeLima* v. *Bidwell* (supra), referring to these decisions, Mr. Justice Brown said:

> In the same case of *Arnson* v. *Murphy*, 109 U. S. 238, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliott* v. *Swartwout* was recognized, but so far as respected customs cases (i. e., classification cases) was held to be superseded by the statutes. So in *Schoenfeld* v. *Hendricks*, 152 U. S. 691, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The revenue laws providing that whenever a tax is assessed by the collector of revenue, according to the procedure authorized, the taxpayer must pay the tax, and then secure judicial determination upon his rights by means of action to recover the amount claimed by him not to have been owing, have uniformly been upheld; and the Supreme Court has consistently held that the taxpayer must pay the tax and then pursue strictly the remedy provided by the statutes for his relief. *Murray* v. *Hoboken Land Company*, 59 U. S. 272; *Springer* v. *U. S.*, 102 U. S. 586; *Dodge* v. *Osborn*, 240 U. S. 118.

The Captured and Abandoned Property Act of March 12, 1863 (12 Stat. L. 820), authorized the

Secretary of the Treasury to appoint special agents to receive and collect all abandoned or captured property in any State or Territory designated as in insurrection, and authorized any of such property to be appropriated to public use, or to be forwarded to any place of sale within the loyal States, and there sold at auction to the highest bidder, and the proceeds paid into the Treasury. Section 3 provided:

> Any person claiming to have been the owner of any such abandoned or captured property may at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of the said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds, &c.

The validity of this provision was upheld in the case of *Haycraft* v. *U. S.*, 89 U. S. 81.

After the acquisition by the United States of territory ceded by Mexican grants, Congress, on March 30, 1851 (9 Stat. L. 631), passed an act entitled "An act to ascertain and settle the private land claims in the State of California." This act created a commission to receive and act upon claims and provided that each and every person claiming lands in California by virtue of any right or title should present the same to the commissioners; and that all lands ... claims to which should be finally rejected by the commissioners or decided by the courts upon appeal to be invalid,

or to which no claim should be presented within two years after the date of the act, should be deemed, held, and considered as part of the public domain of the United States. In litigation respecting titles to lands within this territory it was held that, although by the rules of international law and the provisions of the treaty between the Mexican Government and this country the United States were bound to respect the rights of private property in the ceded territory, such obligation was entirely consistent with the right of the Government to provide reasonable means for determining the validity of all titles within the ceded territory.

> Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction and were entitled to protection, whether the party had the full and absolute ownership of the land or merely an equitable interest therein which required some further act of the Government to vest in him a perfect title. (Mr. Justice Brewer in *Barker* v. *Harvey*, 181 U. S. 481.)

It was further held that it was neither unjust nor oppressive nor unconstitutional to require the owners of valid claims to property within that territory to come forward and prove their claims, failing in which the claims were barred and their property became part of the public domain of the United States.

> Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of

lands unclaimed and unjustly claimed, to present his demands to a tribunal possessing all of the elements of judicial functions, with a guaranty of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

We are unable to see any injustice, any want of constitutional power, or any violation of the treaty in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by strict legal title, to private persons. * * *

No doubt could exist, and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any. Such suits would have been sustained without hesitation as being legal, constitutional, and according to right. What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the Government and to the party, and to arrive at safe and

satisfactory conclusions. (Mr. Justice Miller in *Botiller* v. *Dominquez*, 130 U. S. 238, 250.)

Similar legislation respecting lands in Florida was also sustained. *Florida* v. *Furman*, 180 U. S. 402.

In the case of *Moyer* v. *Peabody*, 212 U. S. 78, dealing, it is true, with an entirely different set of facts, but under circumstances where the same general principle must be applied, this court laid down the broad general doctrine that under conditions of great public stress and necessity (in that case a state of insurrection in Colorado), there are times when the rights of individuals must be sacrificed or abridged in order that the very life of the State may be preserved. Under such circumstances the executive processes must be substituted for the ordinary judicial processes. In this case the court laid down the rule as follows (p. 85):

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

On page 57 of their brief, plaintiffs in error attempt to differentiate the two land cases mentioned from the case at bar. It is not intended to urge on behalf of the custodian that the proceedings involved in these cases were in all points analogous to this, but we submit that they do definitely confirm our proposition that the procedure called for by the Trading with the Enemy Act, as interpreted by the custodian,

did not involve any radical departure from the established precedents of American jurisprudence. It is difficult to see upon what our opponents base their assertion that a claimant, under legislation of the character involved in those two cases, was any more secure than a claimant under the original Trading with the Enemy Act. If this "security" is diminished because of the custodian's power of sale, it must be noted that a similar power of sale was vested in the Treasury Department by the Captured and Abandoned Property Act. Furthermore, the seizure of the *res* under the Trading with the Enemy Act necessarily gives constructive notice to any non-enemy owner and upon filing a bill in equity, as contemplated under section 9, the custodian and the Treasurer are automatically, by the terms of the statute, enjoined from making any disposition of the property save such as may be decreed by the court.

The same proposition was involved in litigation under certain statutes of the State of Oregon, which require claimants to water rights for irrigation purposes, to present their claims to a board having semi-judicial powers, to pay certain fees incidental thereto, and subsequently to prosecute and establish their claims in judicial proceedings which could be instituted by any claimants dissatisfied with the finding of the board. *Pacific Live Stock Co.* v. *Lewis et al.*, 241 U. S. 440.

In discussing the constitutionality of legislation providing for the confiscation or destruction of property used for unlawful purposes (Opp. Brief,

pp. 59–61), our adversaries have overlooked two cardinal distinctions: First, that the cases which they cite are for the most part peace legislation; second, that they relate to *confiscation* or *destruction* of property rather than its *sequestration* in the hands of a public trustee.

The case of *Bigelow* v. *Forrest*, 9 Wall. 339, cited by our opponents, merely shows that a decree made by a court patently without jurisdiction may be collaterally impeached, a proposition which we cheerfully concede without, in any way, recognizing its applicability.

Day v. *Micou*, 18 Wall. 156 (p. 63), in substance, holds that a mortgagee not a party to the condemnation proceedings is not bound thereby. This, too, is clear because the possession does not belong to the mortgagee, but to the mortgagor, and seizure of the *res* does not necessarily impart notice to him.

The cases of *Conrad* v. *Waples*, 96 U. S. 279; *Burbank* v. *Conrad*, 96 U. S. 291; *Waples* v. *United States*, 110 U. S. 630; *Avegno* v. *Schmidt*, 113 U. S. 293; and *Sheilds* v. *Schiff*, 124 U. S. 351, cited on page 64 of the brief of the plaintiffs in error, can have no possible bearing upon the question at issue and do not, in any sense, stand for the proposition for which they are cited. All of these cases involve substantially the same proposition, namely, whether or not the United States, in confiscation proceedings, can pass any better title to the purchaser of the property at such proceedings than was held by the person to whom it was alleged, in the confiscation

proceedings, the property belonged. These cases all hold that where property which actually belonged to A was condemned as the property of B, who had no interest in the property, A may bring a proceeding to recover the property, and the purchase at the confiscation proceedings will be no bar to A's recovery. In other words, the United States, in confiscation proceedings, can pass no better title than the alleged owner of the property had. If the alleged owner had no title, the United States at the confiscation sale can pass none. The principle is clear but inapplicable to the question here involved. The proceeding here instituted by the Alien Property Custodian is in no sense a proceeding to try title. This proceeding is purely a proceeding to obtain possession of property in which the enemy admittedly has a large equitable interest.

Furthermore, the Act of July 17, 1862, under which the cases above cited were decided, contains no provision limiting the manner in which seizures by the United States could be tested as to their legality. The Trading with the Enemy Act of October 6, 1917, specifically provided a method whereby the determination of the Alien Property Custodian of the ownership of specific property could be tried. Not only was this provision inserted but it was further specifically provided that the method of trying the determination of the Alien Property Custodian should be exclusive. Under these circumstances, unless it is asserted, and no such assertion is made by the plaintiffs in error, that the method provided by the

Trading with the Enemy Act for trying the legality of the President's determination does not afford due process of law, there can be no objection made by anyone that the method thus provided is exclusive.

The plaintiffs in error lay some stress upon the fact that, under the confiscation statutes, only the enemy's interest in the property confiscated could be forfeited. Here again the inapplicability of the cases cited to the case at bar is demonstrated. The Confiscation Act of July 17, 1862, was, in its essence, an act which provided for the absolute confiscation of enemy property. The Supreme Court, in interpreting the extent to which property could be confiscated, it is true, did hold that only the enemy's interest in the property could be declared forfeited, and that only for the life of the enemy. This construction was arrived at by the Supreme Court in view of article 3, section 3 of the Constitution of the United States, which provides in part:

> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

In view of the provisions of the Trading with the Enemy Act, the mere statement of the provisions of the Act of July 17, 1862, demonstrates the difference between the two acts. On the one hand there is an act which provides for absolute confiscation of property, and on the other, one which merely provides for sequestration of enemy property. In so far as

may be known at present, not even the estate of the enemy in the property held by the Alien Property Custodian will be confiscated. Hence, no constitutional question as to the extent of a seizure by the Alien Property Custodian is raised. The plaintiffs in error assert that Congress can not have intended to make the custodian's determination that he has the right to seize conclusive upon the courts, for they say such a determination would render the act unconstitutional for it would confiscate property without due process of law and give to the custodian a share of the judicial power which, under the Constitution, can be lodged only in the courts. Such a statement could be based only upon a faulty understanding of the Trading with the Enemy Act. Mere seizure under the Trading with the Enemy Act can, in no sense, be called confiscation, and, even if the imagination could be stretched to such a point that the seizure of the Alien Property Custodian could be called an attempted confiscation, the act would not be unconstitutional in view of the clear and explicit remedy provided under section 9 whereby the determination of the Alien Property Custodian may be tested. While this remedy remains, in contemplation of the law there is no possibility that a person rightfully entitled to property seized by the Alien Property Custodian can be materially injured or deprived of property without due process of law.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, and *Gegiow* v. *Uhl*, 239 U. S. 3 (pp. 64–66 Opp. Brief), are not in point here. Neither

case involved a war statute and both cases involved action by executive officers of the Government which, in its essence, was final and conclusive upon the rights of the parties. In other words, there was no section 9 to operate as a safety valve for these two statutes.

Interstate Commerce Commission v. *L. & N. R. R. Co.*, 227 U. S. 88 (p. 67), is also beside the mark. In that case evidence showing the unreasonableness of the rates was a requisite of like importance with the "investigation" which the Alien Property Custodian is required to make under the Trading with the Enemy Act, and the absence of such evidence would be an ouster of jurisdiction just as would the refusal of the custodian to investigate oust his jurisdiction to demand property. Of course, if there was a willful disregard of patent facts by the custodian or if he determined enemy ownership in the absence of any evidence whatsoever in support thereof (as suggested in the interlocutory opinion of Judge Hand, in *American Exchange Bank* v. *Palmer & Simon*, *infra*, p. 22), in such a case he would not be acting with that degree of good faith which the law requires, and the courts would rightfully decline to lend him their aid in obtaining possession of the property. Here, as the pleadings show, there was an investigation or its complete equivalent—a full knowledge of all the facts.

4. *The decisions so far rendered upon the Trading with the Enemy Act support this contention.*

Salamandra Life Ins. Co. v. *N. Y. Life Insurance & Trust Co.* (254 Fed. 852), was the first case squarely

presenting this point and like the case at bar involved insurance trust funds, possession of which was demanded by the custodian. The facts surrounding the deposit were different from those here, but the decision as to the custodian's power of capture is convincingly expressed by Judge Knox:

> However, the Alien Property Custodian having determined that the fund in question is alien-owned, and even though that conclusion may be founded upon evidence which would appear to this court to be insufficient, the determination of the custodian, so long as it is not reached in bad faith, must determine the possession of the fund.
>
> Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the custodian, and as an administrative matter I do not see where else it could be if the Act is to have any salutary effect in the way of rendering enemy property unavailable for the purpose of the enemy.

Our construction was denied by Judge Mayer in his original opinion in the case of *American Exchange Bank* v. *Palmer & Simon* (U. S. D. C. of N. Y.), 256 Fed. 680, and also by Vice Chancellor Lane in his opinion in the case of *Keppelmann* v. *Keppelmann* (N. J. Chancery), 105 Atl. 140. The original opinion in the *Exchange Bank* case was modified upon reargument; and in so far as the opinion as distinguished from the decision is concerned, it was overruled subsequently by decree of Judge A. N. Hand in the same

case, holding that the money in question would be ordered paid to the custodian simply upon the basis of his determination and demand, unless the claimant Simon so amended his answer as to aver not merely that he was the owner of the funds, but that there was no evidence whatsoever to justify the determination of the custodian that it was enemy owned. The decision of Vice Chancellor Lane in the *Keppelmann* case was reversed by the New Jersey Court of Errors and Appeals, N. J. Repts., 108 Atl. 432. This decision definitely holds that the Trading with the Enemy Act establishes a complete plan for the capture of enemy property; that it is immaterial whether legal title be in the enemy provided the property be held for him or for his benefit; and that this, like all other war measures, enacted by Congress necessarily overrides State statutes in conflict therewith. The principal point of contention was the insistence upon the part of the trustees in that case that the custodian execute a refunding bond required by the New Jersey statutes in such cases. It was held that no such bond could be exacted of the custodian and that "any payment, conveyance, transfer, or assignment or delivery of money or property to the Alien Property Custodian shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." This court denied petition for writ of certiorari to the New Jersey court in this case.

The opinions of the district judge (p. 79), and of the Circuit Court of Appeals (p. 92) in the cases at bar, are in full harmony with this interpretation of the Act, and the Circuit Court of Appeals in so holding said:

> We agree with the Alien Custodian, and can not read the perfectly plain language of 7 (e) in any other way. As all of the facts were known and undisputed they amounted to an investigation by the Alien Custodian. If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9.
>
> * * * * *
>
> It is obviously of the utmost importance that in time of war enemy property should be put into the possession of Government; on the other hand, no great harm can come to the interests of innocent persons since the possession and management of the property by the Alien Custodian is under the control of the President by regulation and of the courts by decree. Policyholders or creditors may proceed to protect their rights under section 9, or the trustees may do so for them.

To the same effect are the decisions of the same Circuit Court of Appeals in the following cases:

Garvan v. *$25,000 Bonds*—securities of Aachen & Munich Fire Insurance Company—decided in November, 1920. (Not yet reported. Copy of opinion is annexed to this brief as Appendix "C.")

Garvan v. *$6,000 Bonds*—securities of Frankona Reinsurance Company (265 Fed. 481).

Garvan v. *$100,000 Bonds*—securities of Mannheim Insurance Company. (Docketed for appeal this court. See transcript, Case 396, p. 60.)

Garvan v. *$25,000 Bonds*—securities of Frankfort General Insurance Company. (Docketed for appeal this court. See transcript, Case 392, p. 34.)

Garvan v. *$100,000 Bonds*—securities of Allianz Insurance Company. (Docketed for appeal this court. See transcript, Case 393, p. 33.)

The two cases last named were covered in the Circuit Court of Appeals by the same opinion as were the cases at bar, although the pleadings and facts were slightly different.

In *Biesantz* v. *Supreme Council of the Royal Arcanum* (175 N. Y. S. 46), in the opinion on motion for reargument, the court said:

> That act expressly gave the President powers to act if, after investigation, he determined that the money was owed to or the property was owned by an enemy. But his determination was not final. It, however, was sufficient, in the first instance, to require the delivery of the property or the payment of the debt to the Alien Property Custodian. Then, if the President's determination was questioned, any person claiming a right to the property could sue in the District Court.

And in *Kahn* v. *Garvan* (263 Fed. 909):

> There can be not the least doubt that the capture was within the act, because section 7

(a), third paragraph, and section 7 (c) and section 7 (d) all very clearly include equitable interests in any kind of property.

The only other points which can be raised as to the capture are that the demand was not signed by the Alien Property Custodian personally and that the daughters were not enemies. As to the first, it is covered by section 3 (a) of the Executive order of February 26, 1918, unless that be invalid. That section authorized a delegation by the President to the Alien Property Custodian of his own power to delegate, and it is of course inconceivable that such an officer should not have the power to distribute his duties among his subordinates. The duty is executive, not judicial, *Funkle* v. *U. S.*, 122 U. S. 543, not even the preliminary investigation, which concludes no one and is without force in a suit under section 9.

But the vice of the bill is deeper, because the plan of the act is that, so far as concerns capture, the decision of the Alien Property Custodian shall be conclusive, and there shall be no remedies whatever except under section 9. Doubtless if the custodian, exceeding his powers, seized property not covered by the act, or without any demand, he would be guilty of trespass, and could be sued individually, but the *res* seized by color of his office would be captured and sequestered, and no process would run against it or against anyone who delivered it to him because of that delivery, *Garvan* v. *$25,000 Mortgage Bonds*, supra; *Salamandra, etc., Co.* v. *N. Y.*

Life Ins. Co., supra. Thus, even if the questions raised were in enough doubt of themselves to justify a bill of interpleader, none such could lie here. The act intends the immediate reduction to possession of all property which the custodian shall decide to be enemy property; all questions arising from his mistakes or even from his oppressive or arbitrary action are relegated to suits under section 9. By the capture nothing is condemned, nothing confiscated, nothing concluded. The citizen runs only the risk of temporary dispossession through the misprision of the officials, not always a light matter, it is true, but a necessary incident of war. To entangle this power in incidental litigation would be substantially to deny its value, which depends upon its speedy and absolute exercise. Therefore, the plaintiff has complete protection in section 7 (e) and there is no ground for an interpleader.

In *Kohn* v. *Garvan* (264 Fed. 253), the opinion of Learned Hand, D. J., contains the following:

> The question of the proper formalities for capture remains. The obligor is to "transfer * * * or pay" the "money, if the President shall so require." The President promulgated under section 5 (a) of the Act certain rules on February 26, 1918. Rule 2 (a) prescribed a "demand" by the Alien Property Custodian as the proper way to require the transfer, etc., and rule 2 (c) that such a demand "shall forthwith vest in the Alien Property Custodian such right, title, etc., in the money or other

property demanded * * * as may be included in the demand." If the rule is valid, the demand affects the transfer of the property. A moment's reflection seems to me to make it clear that it must be so, else the statute puts a premium upon resistance and delay. The analogies of attachment and garnishment are directly in point. It can not of course have been the purpose of section 7 (c) to permit its purpose to be frustrated by recalcitrants who might by prolonging their contests destroy the right of capture till peace was declared, when it would be too late. Section 17 gives the Alien Property Custodian his remedies to reduce to possession his title, *Garvan* v. *$25,000 Mortgage Bonds*, N. Y. Law Journal, March 23, 1920, but title must be complete by the symbolic act of capture. Probably the rule was unnecessary, but it was unquestionably valid.

During the preparation of this brief (Dec. 18, 1920), District Judge Knox, of the Southern District of New York, has handed down an opinion in the case of *Garvan* v. *Deposit Account of New York Funchal Hand Embroidery Company*, which, while not controlling upon this court as we realize, most admirably summarizes the merits of the case at bar. In that case, the custodian had libeled a bank account of the New York Funchal Hand Embroidery Company after refusal of the bank and the manager of the company to recognize his demand. Charles H. Streb filed claim, setting up nonenemy ownership of the funds, and applied to the court for a commis-

sion to take testimony in Europe to maintain the issues so raised. The custodian resisted the issuance of a commission on the ground that the ultimate merits were immaterial and irrelevent, the sole question being whether or not the custodian, after investition, had duly required the transfer to himself.

Judge Knox said:

> In *Salamandra Insurance Company* against *N. Y. Life Insurance & Trust Company*, 254 Fed. 852, with respect to a questioned seizure of property by the Alien Property Custodian, I held that even though the custodian's determination of the alien ownership of a fund might be erroneous, such determination, once made in good faith, would fix the possession of the fund in controversy. The numerous decisions upon the authority of the custodian since the Salamandra case, both by the State and my own appellate court, do not indicate that my first impression upon the subject was wrong. Indeed, such subsequent holdings of of the courts have justified my conclusion. The ruling then announced is applicable in the present instance. It may be that the need of the enforcement of the rule, as a practical matter, is not so important now as it was during the time of actual hostilities; nevertheless, the principle can not be departed from when danger is less imminent. In the present suit I do not understand that the question of actual ownership can be litigated, and if not the relief prayed for is not essential to the protection of defendant's rights. Should the fund pass into the hands of the custodian and

appropriate proceedings then be instituted to recover the money, the plaintiff in that suit may need the assistance of this court to procure his proof. He may then move for it.

The present motion is denied.

5. *The answer sets up no facts sufficient to justify any exception in this case to the proposition under discussion.*

The argument made in the District Court that the answer denied any investigation by the custodian and therefore, in the absence of proof of such, he was not entitled to judgment, apparently has been abandoned upon this appeal. If, as the answer averred (par. 35, p. 21), the custodian knew all of the facts, certainly he must have made as full an investigation as the facts required. The District Court in passing on these cases so held (pp. 83, 84), and this was also the opinion of the Circuit Court of Appeals (p. 95).

Nor is there foundation for the contention that the pleadings show the facts to be undisputed and therefore that the determination of the custodian will be reviewed when otherwise it would not because his determination amounts to a determination of a proposition of law. The act gives to the President the power of determining the question of enemy ownership, whether legal or equitable, beneficial or otherwise; and whether this be considered a determination of a matter of fact or a matter of law is immaterial. There is no justification for attempting to apply here those ar-

bitrary and unnatural distinctions between issues of fact and issues of law which are the outgrowth of the jury system. We are not concerned here with fine spun theories concerning the respective functions or powers of the judge or court on one side and the jury on the other. The President is given the power of determining, after investigation, whether money or other property is owing or belonging to, or held by, for, on account of, on behalf of, or for the benefit of an enemy, whatever sort of a determination that may be. He is, for the purpose of this determination, which settles not questions of ultimate right or title but simply the question of immediate possession, both judge and jury. In the last analysis every question of ownership is a question of law; and this argument, if carried to its logical conclusion, would repeal the whole Trading with the Enemy Act.

The cases cited, arising under the immigration and similar laws, are not in point for several reasons. Those acts are peace legislation, while this is a war measure. They purport to make the finding of the official absolutely binding with no review by the courts, while this act expressly provides for review of any erroneous determination that may have been reached by the custodian; and, finally, the wording of the acts is materially different.

6. *The fact that the Alien Property Custodian has resorted to the courts for the enforcement of his demand does not alter the construction of the Act with respect to*

his right of possession pending judicial determination of the property rights in the securities libeled.

The argument on this question made by plaintiffs in error (Opp. Brief, pp. 77–81) misconceives the entire scope and purpose of the Trading with the Enemy Act. If the foregoing argument is sound, the demands issued by the Alien Property Custodian, requiring that these securities now libeled be delivered to him, and his orders for the seizure thereof, were lawfully made and entitle him to possession. It would be a strange perversion of the law to place a premium upon disobedience to the clear mandates of a war statute by holding that when litigation ensues the person who had disobeyed the law had by such disobedience acquired greater rights than the person who had complied with its requirements. In addition to the requirements authorized by section 7 (c) as first enacted, the amendment of November 4, 1918, vested in the custodian the power of seizing property which had been determined by the President, or by the custodian exercising the power of the President, to belong to or to be held by, for, on account of, on behalf of, or for the benefit of an enemy. The custodian without an order of the court might well have directed the United States marshal as agent for the custodian to effect the same seizure that subsequently was made under orders of the District Court in these cases. The fact that, in view of the large amount of property rights involved and in order that there be no unseemly disturbance or breaches of the peace, the District Court

under the powers granted to it was called upon to enforce the demand and effect the seizure, should not alter the rights nor change the requirements of the Act with respect to the manner in which claims in conflict with the custodian's demand should be asserted and judicially determined. Section 17 authorizes the District Courts to enforce, but not to obstruct, the provisions of the Act. The right of appeal granted was intended to apply to decrees determining property rights, as distinguished from those awarding possession to the custodian pending such determination.

The cases cited by plaintiffs in error are not applicable. Those like the *Magnetic Healing* case, 187 U. S. 94, the immigration cases, and the land cases are distinguishable because the executive determination there assailed was by the terms of the statutes in question made final and determined not merely possession pending litigation but the final rights of the parties. Here the statute expressly provides an adequate remedy and enacts that it shall be the exclusive method of securing judicial determination upon the rights of the claimants.

The same is true with respect to actions brought by the United States for the collection of taxes. In those cases the Government comes into court asking for a final decree and the taxpayer, or his surety, would have no other opportunity for judicial determination of the amount actually owing unless given such in that action.

Our opponents' principal reliance appears to be on the case of *Clinkenbeard* v. *U. S.*, 21 Wall. 62, a decision which they have evidently misunderstood.

The Internal Revenue Act of 1868, 15 Stats., 133, provided that distillers should give bond for payment of taxes, the distiller to be considered such from one hour after the time of giving the bond. In order to begin to distill, the law required a warehouse to be established to which a storekeeper must be assigned by the Commissioner of Internal Revenue upon notice by the distiller. If the distiller desired to cease work he must apply to the commissioner, who would have his furnaces locked and sealed. It was further provided that the assessor should determine each month whether the distiller had accounted for all the spirits produced, and in case the distiller's return should be less than the quantity ascertained by the method prescribed in the statute he and his bondsman should be assessed for such deficiency at a specified rate per gallon; and that in no event should the quantity of spirits returned by the distiller be for less than 80 per cent of the producing capacity of the distillery. This provision obviously made it material in fixing the tax in any given case to know for just how long a period the distillery had operated.

The defendant was sued to collect a tax and the declaration set up a deficiency in a return and contained an averment that the defendant had not paid the tax duly assessed upon the aggregate capacity of the distillery for the month in question. De-

fendant pleaded performance of his obligation and offered to introduce evidence showing that during the first four days of the tax assessment he was unable to operate because the Government had not assigned him a storekeeper and that for four other days an unavoidable accident had prevented operation, and during this last period, pursuant to due notice given by defendant, the machinery was locked as required by law. The case came to the Supreme Court on the question of the competency of the proof so offered.

By a five to four decision this court held that the evidence was competent and ordered a new trial. The statute relied upon by the Government in this case forbade maintaining a suit for the recovery of a tax alleged to have been illegally assessed until an appeal had been made to the commissioner, and relief denied.

The court said:

> The suit thus prohibited is a suit brought by the person taxed to recover back a tax illegally assessed and collected. This is different from the case now under consideration, which is a suit brought by the Government for collecting the tax, and the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he can not, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner.

The statute relied upon by the custodian in this case is wholly different, containing, as it does, the clause to the effect that the "sole relief and remedy of any person *claiming an interest* in any property conveyed to the custodian or required so to be" shall be that provided by the terms of this Act, viz, the relief and remedy provided by section 9, which is announced as a remedy open to any person not an enemy or ally of enemy *claiming any interest* in property which has been so conveyed, etc. The Revenue Act in question merely limited the rights as plaintiff of a person who had already paid a tax illegally assessed. The defendant in that suit had not paid the tax and had nothing to recover, so the statute was absolutely inapplicable to him.

The other cases cited immediately following the *Clinkenbeard* case (p. 77) are also not in point, for it does not appear in any of these revenue cases that there was any statute prohibiting the right of defending on the merits a suit brought by the Government for the purpose of restraining the collection of the tax, though in addition to the Act of 1866 construed in the *Clinkenbeard* case, there was also a statute prohibiting the institution of any suit to enjoin collection of the tax. All of these revenue cases are essentially *final determinations* of the legality of the tax, and in each instance it was rightly held that the Government may not hail its citizens into court on a debt action and at the same time urge that court to hear no defense. Any other procedure would have been denial of due process of law, for the distiller

after paying a judgment so rendered would have been barred from further relief by the doctrine of *res adjudicata*.

In these very cases at bar the Circuit Court of Appeals referred with approval to the action of the custodian in invoking the aid of the court to secure possession of these securities (p. 94):

> * * * but it was much more orderly and decent to obtain possession by the aid of the court than to seize them by violence and the strong hand.

Surely it would be the strangest paradox in the field of jurisprudence if the custodian should be penalized for his prudence and respect for public order by being required to do that in a judicial proceeding which obviously he would not have been required to do had he elected to exercise his legal right of seizure under section 7 (c), as amended.

7. *Comments on portion of brief for plaintiffs in error relevant to our Proposition I.*

Comment will be limited to such part of our adversaries' brief as has not been fully answered above. Page references under this caption will refer to the opposing brief unless otherwise indicated.

In pages 24–44, inclusive, is contained an elaborate discussion of principles of capture on land and water as covered by various decisions, principally of this court. It is difficult to see the exact relevancy of this discussion, as decisions based upon general principles of international law are obviously not control-

ling upon this case where the method of capture is governed by specific statute.

The distinction which our opponents strive to make between the procedure of the Captured and Abandoned Property Act (12 Stat. 820) and the Trading with the Enemy Act is not well taken. True it is that the property which the Treasury agents were supposed to collect was abandoned and captured property in the States of the Confederacy, but the determination that the property fell within that category was left entirely to the Treasury agents. There was therefore nothing save the presumption of due performance of duties by public officials to give assurance that the property so taken was of the kind described in the statute. The same presumption of regularity attaches equally to the determinations made by the Alien Property Custodian. It should be noted that the Captured and Abandoned Property Act provides that the property may be appropriated to public use or sold at any convenient time in the loyal States at auction to the highest bidder and without any previous condemnation proceedings. The only remedy of claimants under that Act was to proceed in the Court of Claims against the proceeds, *Haycraft* v. *U. S.*, 89 U. S. 81.

Unlike the Trading with the Enemy Act, this legislation did not provide means whereby the aggrieved loyal owner, by the mere filing of a suit, might automatically enjoin sale or disposition of the property, and to that extent the provisions of that Act are far

more adverse to nonenemy owners than those of the Trading with the Enemy Act, and the fact that its procedure has been upheld is *a fortiori* an argument for sustaining the custodian's right of capture upon the theory set forth in our brief.

It is true that the Confiscation Acts of 1861 and 1862 both contemplated condemnation by judicial proceedings. The Act of 1861 was in some ways far broader than anything in the Trading with the Enemy Act, for under the first section any property used or intended to be used in aiding, abetting, or promoting the insurrection is to be confiscated. Determining the intent to use property for such purposes might involve complicated questions of law and fact, and it therefore appeared to be the wiser plan to require the Government to prove its case in court. As the property taken by the custodian under the Trading with the Enemy Act was much more simply classified as the property "owing, or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of an enemy" it was not necessary to provide for the Government to be the moving party in possessory proceedings, for the Executive determination would be correct in the vast majority of cases, and mistakes readily corrigible under section 9.

The Act of 1862 is essentially a penal provision forfeiting property of certain individuals and where condemnation by judicial proceedings was especially

appropriate because of its quasi-criminal character. Furthermore, both of these Confiscation Acts were intended absolutely and irrevocably to defeat the title of the former owner, while the Trading with the Enemy Act reserves the final disposition of the problem until the end of the war.

Plaintiffs in error seem to overlook the broad and comprehensive power of legislation vested in Congress by the Constitution with respect to war legislation. The constitutional provision is purposely so worded as to give to the legislative branch the maximum of flexibility in this respect and the fact that Congress did not see fit in previous wars to employ its powers for legislation exactly similar to the Trading with the Enemy Act does not in any wise weaken the plain meaning of the relevant sections of that Act as already discussed in this brief.

Both of the Confiscation Acts contemplate the seizure of the property by the President. No case has been brought to our attention in which an effort was made to interfere with this preliminary Executive seizure prior to condemnation proceedings, but we fancy that the courts would have made short work of any interference of this kind. After all, such obstruction would be very nearly on all fours with refusal to obey the presidential requirement under the Trading with the Enemy Act. In both cases the captures effect the right of possession.

As a reason against our construction of section 7 (c) it is suggested (pp. 52–53), that the claimant may

be out of the country in a distant part of the world and may never hear of the seizure. It is a fundamental principle that seizure of property is presumed to convey its own notice to the owner wherever he may be. The doctrine of adverse possession as applied to land is a familiar illustration of this principle. The courts have repeatedly held that if a certain procedure is reasonably calculated to impart actual notice to a party at interest the fact that such notice was not actually received in a given case will not vitiate the proceedings. Upon this principle, modern procedure for quieting title to land is largely dependent.

In discussing the case of *Murray's Lessee* v. *Hoboken Land Company*, 18 Howard 272, plaintiffs in error seem to feel that there is, in respect of tax legislation, a degree of public necessity that makes it paramount and in a class all by itself. This is true enough in times of peace, but it would be strange if any mere revenue proceedings would be regarded as less subject to interference than an Act which in time of war seeks to weaken the enemy's resources by capturing his material wealth, money, and credits.

Proposition II.

The facts set forth in the answers confirm the determination of the custodian and justify his demand. These facts, if true, establish that the securities libeled belonged to or were held for the Munich Re-Insurance Company within the purview of section 7 (c); that although policyholders and creditors of that company within the United States may have an interest in the nature of security therein, such interest is not within the scope of section 8 (a); and therefore that the custodian is entitled to possession of these securities, leaving the protection of whatsoever rights these creditors and policyholders, or these claimants on their behalf, may have to the remedies provided by section 9.

The foregoing argument under Proposition I, that this present action must be disposed of by this court without reference to the merits of the rights asserted by claimants herein, is not made because of any inability to sustain at the proper time and in the proper proceeding the determination made by the custodian. Whether the issue in these cases be merely that of possession pending litigation under section 9 of the Act, or whether it be the substantive rights of the parties, the conclusion must be reached that the Alien Property Custodian is entitled to possession of the securities libeled.

Neither the statutes of Connecticut in question nor the terms of the so-called deed of trust contemplated or effected any change in ownership of the securities deposited by the Munich Company with the trustees. Whether the legal title remained in

the company or became vested in the trustees is immaterial. If the trustees did hold legal title, they held such title in trust—not for the creditors and policyholders, but for the company. The Munich Re-Insurance Company remained the owner of these securities, both in the ordinary acceptance of the term and within the meaning of section 7 (c) of the Trading with the Enemy Act. This conclusion is not altered by the fact that the policyholders and creditors of that company within the United States held an interest in the nature of security therein; and the Trading with the Enemy Act clearly contemplated that in situations such as this the custodian should take possession of the property, leaving the provisions of section 9 the enforcement and protection of the security rights held by these American policyholders and creditors.

1. *The Connecticut statutes.*

Connecticut statutes relevant provide that no fire insurance company shall expose itself to loss on any one risk exceeding 10 per cent of its paid-up capital and surplus; provide a method by which outstanding policies under which no losses have occurred shall be computed in considering the liabilities of the company; and authorize the insurance commissioner to restrain further transaction of business whenever the net assets of a company, estimating its liabilities as therein provided, amount to less than three-fourths of its capital stock.

It being palpably impracticable to apply these provisions to a foreign insurance company, it was

enacted that such foreign companies, before doing any business, must deposit $200,000 with the State insurance officials, and, for the purposes of the regulations applicable to domestic companies, the capital of these foreign companies should be this $200,000 deposited and such other approved insurance investments that might be made in the United States, provided that such investments be held in the United States by trustees who are citizens of the United States and for the benefit of policyholders in the United States (see pars. 9 and 10 of answer, pp. 12–13). There is nothing in these statutes making it obligatory upon the foreign company to deposit any securities with the trustees, the only penalty imposed for failure so to do being a limitation of any one risk to the given percentage of the $200,000 deposited as a condition precedent to doing any business.

Neither does it provide that legal title shall be vested in the trustees, nor are any of the terms and conditions of the trust prescribed, nor is it specified how or to what extent the securities shall be held for the benefit of all its policyholders and creditors in the United States. There is no express provision that in the event of insolvency the American policyholders and creditors have any right of priority over any other creditors of the company, the provisions of the statute apparently being satisfied by the mere holding of these securities within

the United States where they would be subject to proper process from courts of competent jurisdiction.

2. *Terms and conditions of the deed of trust.*

The terms of the deed of trust are entirely consistent with the requirements of these statutes as above construed. The pertinent provisions appear to be as follows:

> 1. The trustees shall receive, hold, possess, and keep all assets and property delivered to them by the company *to be held in trust for the company* (first paragraph, p. 24).
>
> 2. The trustees are required to render strict account *to the company* (second paragraph, p. 24).
>
> 3. The trustees have power to invest and reinvest but *only with the previous consent of the company* (third paragraph, p. 24).
>
> 4. The current income is to be paid *to the company* as it accrues and is received (third paragraph, p. 24).
>
> 5. The right is reserved *to the company* to withdraw funds for the purposes of making deposit in other States (fifth paragraph, p. 25).
>
> 6. The right is given *to the company* to fill vacancies; and, without assigning cause, to remove trustees and appoint successors (sixth and seventh paragraphs, p. 25).
>
> 7. The trustees stand possessed of the trust funds *at the control and subject to the order of the company, and the company has the right to revoke or modify* the trust and conditions and powers, provided only (a) so much of the trust fund as may be necessary to cover outstanding liabilities to the policyholders or

creditors in the United States remains in the possession of the trustees, or (b) the rights of the policyholders or creditors in the United States shall not be impaired (ninth and tenth paragraphs, pp. 25–26).

8. *The trustees are under no obligation* to apply or appropriate the trust property for the payment of debts or liabilities; and have power to do so only (a) unless and until the amount and validity shall have been admitted by the company, or (b) the validity and amount thereof shall be established by the claimant in due course of law (fourth paragraph, p. 24).

The effect of these provisions is to leave in the insurance company all of the rights and powers incident to ownership other than the mere right of possession, and under certain circumstances permits the company to secure such possession.

The attempt, however, to avoid the effect of this proposition by stating that all of the provisions in this instrument, contrary to their contention, "may be dismissed at once as purely verbal," is a not uncommon form of attempting to answer arguments or facts otherwise unanswerable.

The express provision that the securities shall be held by the trustee, in trust for the company, must be conclusive, unless necessarily negatived by the other provisions of the instrument. Instead, the whole instrument is consistent therewith. The trustees' account, not to the policyholders or creditors, but to the company; the investments and reinvestments are made, not under the control of

the policyholders and creditors, but of the company; the current income is paid to the company as it accrues; the company is authorized to withdraw funds for making deposits in other States, without any limitations upon the terms or conditions under which such deposits are, by law, required to be made in the various States; the trustees can be removed and their successors appointed—not by the policyholders and creditors, but by the company; the trustees can apply these securities in satisfaction of claims against the company only when the claims have been reduced to judgment or upon order of the company; the securities, to the full extent of their value, continue to be counted as part of the capital of the company, and the trustees hold the funds, in all respects, at the control, and subject to the order, of the company, provided, only, that the policyholders and creditors be protected by the trustees keeping possession of a sufficient part of the trust fund therefor, or the rights of such policyholders and creditors otherwise be protected and taken care of.

In short, the only functions left to the so-called trustees was to hold the keys of the vaults where the securities were kept. So long as the company continued actively in the insurance business, these securities were for all purposes as fully and effectively under its power and control as securities in the hands of its United States managers. In the practical administration of business of this kind securities such as these are almost universally kept

in safe deposit vaults of some kind or other, and so long as the insurance company receives the income therefrom, controls the investment and reinvestment thereof, and can apply the principal in satisfaction of its debts, or can withdraw the same for purposes of deposit in other States, it has the full beneficial use and enjoyment thereof.

If this deed of trust deprived the Munich Company of any right or power incident to ownership other than that of carrying the keys to the vaults where the securities were kept, we have not been able to imagine it and appellants have not suggested it. If it be true, as argued in the Trustees' brief in the court below, that the provisions respecting appropriations of the trust property in payment of claims be mandatory upon the trustees, rather than permissive, it adds force to the foregoing argument. If the trustees have no discretion with respect to such payments, it leaves the company free, merely by executing an admission of liability and an order upon the trustees for payment, to make disposition of those securities as freely as if the trust had not been executed. It is, however, immaterial whether these provisions be permissive or mandatory. The power to give the permission or to issue the mandate is not in the creditors or policyholders, but in the insurance company; and in so far as the situation applies to claims reduced to judgment, it makes little difference to the judgment creditor, so long as the securities are within reach of judicial process.

No beneficial interests or rights in favor of policyholders and creditors within the United States are created either by the statutes or by the deed of trust, other than that the securities be kept physically within the United States and beyond the power of the company, by concealment or otherwise, to place them beyond reach of judicial process. If the creditor could secure an admission of liability in writing, he could secure payment by the company, whether the securities be with the trustees or in its own unfettered control; and the judgment creditor, of course, could secure payment with equal facility, whether the key to the vaults in which the securities were kept be carried by the trustees or by the United States managers of the insurance company. The interpretation most favorable to the creditors and policyholders in the United States gives them no greater rights than those of a pledgee, the pledge being made with the trustees rather than with the creditors, because of the number of the latter and the contingent and uncertain character of their claims. If the transaction be interpreted as a pledge, however, it was a pledge with no power given to the pledgee to foreclose or otherwise realize upon the pledged property; and it is a matter of extreme doubt whether the pledgee had any right or priority or whether the extent of the pledge was not limited merely to keeping the securities physically located within the United States and at all times available to proper judicial process.

That the maximum interest of creditors and policyholders in the seized securities is as stated above, may be readily seen in the provisions of the sixth and seventh paragraphs of the deed of trust (p. 25) giving the company complete and arbitrary power of removal of the trustees at pleasure and a like power to fill all vacancies (subject, of course, to the statutory limitation that trustees shall be citizens of the United States). This shows that no creditor or policyholder has a right to rely upon the performance of the trustees' duties by any particular trustee, nor by any trustee in whose selection the policyholder or creditor has any voice, nor by any trustee in whose selection any public official for the creditor or policyholder has any control. In other words, these trustees are solely the servants and employees of the insurance company, and the policyholders and creditors would have no right to complain of any choice made by the company. How, then, does it lie in the mouths of these trustees to say that the creditors and policyholders have, as it were, a vested right to insist that the duties of the trustees be performed by the nominees of the enemy company rather than by a bonded officer of the United States whose every action is subject to the control of the President of the United States (sec. 12) or to the control of a Federal court of competent jurisdiction sitting in equity (sec. 9). The deed of trust is in substance merely a physical dam or a retaining wall to prevent the impounded securities from passing beyond the jurisdiction of American courts.

3. *Connecticut and other decisions.*

The decisions are all in accord and confirm the position above taken. Unless it be the law that possession and ownership are synonymous, it has been held consistently, whenever the question of ownership was involved, that the securities remained the property of the insurance company making the deposit, and that the trustees, except for the mere holding of possession, were trustees for the insurance company. Although at one time in our law it is true that the owner of personal property, like the owner of real estate who had been dissezed, had lost his title and had left only a mere right of action which he could not transfer or assign, at the present time possession and the right to possession constitute probably the least important of the rights incident to ownership of personal property.

In *Security Co.* v. *Town of Hartford*, 61 Conn. 89, the court expressly found that securities deposited with the trustees continued to be the property of the insurance company.

> In short, after fully considering both contracts, we are unable to resist the conclusion that the property of this safety fund is the property of the insurance company, subject to all the claims, rights, and interests of others acquired therein by virtue of contracts made with the insurance company, its owner. We hold, therefore, that the property constituting the safety fund belongs to the insurance company as *cestui que trust*, and not to the certificate holders (p. 100).

Plaintiffs in error attempt to distinguish this case by arguing that the question for discussion was simply one of taxation, and that as the insurance company had an equity in the assets, they were, under the peculiar character of the taxing statutes involved, considered as assets of the insurance company. This distinction is not well taken. The court did not attempt to ascertain the value of the so-called equity of the insurance company—that is, the value of the securities over and above the amount of the liabilities secured by the fund—but determined that the securities, to the extent of their full value, for all the purposes of taxation, were exactly on the same footing as any other securities belonging to the company and constituting the assets represented by its capital stock. In other words, for the purpose of taxation, the insurance company was the owner. The above quotation from the opinion shows that the court recognized the existence of rights in the nature of security vested in the certificate holders, but determined that, subject to those rights, the insurance company was the owner. The case, therefore, necessarily was a decision that, although subject to a lien, and although not in the possession of the insurance company, the right of property commonly designated by the term "ownership" vested in the insurance company. This is in line with the universal holding that the ownership of property subject to a mortgage, pledge, lien, or other right in the nature of security, is in the debtor and not the person holding the pledge, lien, or other right of security.

This decision is in accord with those in New York. The case of *Cooke* v. *Warner*, 56 Conn. 234, is not in conflict with these decisions. To this extent we agree with counsel for plaintiffs in error. That in any respect this decision was a determination upon any question of ownership, however, we deny. The action for the possession of the securities involved in that decision was brought by a receiver of an insolvent insurance company, appointed not by virtue of any statutory proceedings, but simply under the general equitable powers of the court. In the absence of any statute to the contrary, the court refused to disturb the possession of the trustees. That possession, and not ownership, was the only point decided is clearly shown by *Brackett* v. *Middlesex Banking Co.*, 89 Conn. 645, cited by appellants. In the opinion in this latter case the court, in giving its reasons for the decision, says:

> When a debtor has deposited collateral with a trustee as security for the payment of his debt, the trustee can not be compelled to surrender to receivers of the insolvent debtor the collateral until the debt is paid. And after default, if the trust be one to apply the proceeds of the collateral for the benefit of the secured creditor, the trustee is entitled to administer the trust as against the receivers of the insolvent.

The other cases relied upon involve only this same narrow question of the right to possession, the decisions in some instances being based upon statute and in others upon the general rules developed dur-

ing the rise and growth of equitable jurisdiction of our courts. Most of the New York cases are cited, analyzed, and discussed by Judge Peckham, in his opinion in the *Matter of Home Provident Safety Fund Association*, 129 N. Y. 288, 295–300. It is there said [italics ours]:

> It is unquestionable that the securities in the hands of the superintendent *were always the property of the company*, and liberty was given by statute to change the securities, provided others were substituted of equal value. The provision in the agreement in question in the case at bar, that the funds belonged to the party of the first part, viz, the insurance company, subject to the execution of the express trust provided in the agreement, does not alter the question as to whether a trust fund so situated passes to the receiver of the corporation or remains with the trustee. In each case that of the official trustee and that of the trustee by virtue of the contract, the fund placed with such trustee as security *was the property of the insurance company* so depositing it, but in both cases it was subject to the trust created, the one by statute, and the other by agreement; and I do not see that the court has any more power in the case of the trustee by contract than it had in the case of official trustee to take from the possession of the former securities placed with it by virtue of a valid agreement which it had entered into with an insurance company subsequently dissolved by the court.

The case of *Lancashire Insurance Company* v. *Maxwell*, 131 N. Y. 286, involved simply the question whether the applicable statutes of New York had changed this rule, and had vested in the court power to authorize its receiver to take these securities from the possession of the trustee—in that particular case the superintendent of the insurance department of the State of New York. It was held that these statutes had not changed this rule, although the opinion affirms the proposition that the securities were the property of the insurance company; and in addition it is expressly pointed out that the decision turned not upon inherent rights which could not be changed by appropriate legislation, but simply involved the powers of the court of equity in the absence of legislation.

> It may be that legislation providing for the withdrawal of the amount over the minimum sum upon the terms and conditions set out in the special term order would be valid and proper, but this is a matter for the legislature, and not for this court (pp. 292–293).

The decisions in *People ex rel. Ruggles* v. *Chapman*, 64 N. Y. 557, and *Ruggles* v. *Chapman*, 59 N. Y. 163, emphasize this proposition, that the question for determination there reached was a determination of rights in the absence of legislation, and not a determination that the possession of the trustees was one which could not be changed by appropriate legislation.

> We venture to add that it is better that the legislative power should be invoked to

> resolve the difficulty and to provide for the protection of the rights of the parties interested in such cases, by general laws, than that the courts should attempt to build up a system out of the discordant and scanty matter of positive enactments now to be found in the statutes (Johnson, J., in *Ruggles* v. *Chapman*, 59 N. Y. 165).

There was in these cases the added factor that the statutes of New York pursuant to which the deposit had been made with the State superintendent of insurance provided a definite method for liquidation and distribution of the securities, which is entirely lacking in the Connecticut statutes and the deed of trust involved in this pending action.

It is rather interesting in this connection to note that in the *Home Provident Safety Fund Association* case the court, although refusing to place its own receivers in possession of the securities, nevertheless effected the same result by requiring that the trustees be made a party to the proceeding and the trust fund distributed under direction of the court. In effect, therefore, it made the trustee its receiver.

> It results from these views that the trustee must be a party to any proceeding which may be taken looking to a disposition of this fund, and that it has the right to make distribution thereof *under the direction of the court* (129 N. Y., 301).

The other cases cited by plaintiffs in error, on page 31 of their brief, it is unnecessary to discuss in

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The fact that these decisions were based upon absence of legislation permitting the trustee's possession to be disturbed by a receiver, and not because of the disability of the legislature to enact such legislation is corroborated by the enactment of the following law by the legislature of Connecticut in 1899:

> Section 3611. *Securities to be delivered to receiver.*—Whenever a receiver is appointed in this State of any insurance company which has deposited securities with the State treasurer in trust for the policyholders of such company, the court to which such receiver is accountable shall, after finding that such receiver has duly qualified, authorize such receiver to receive the securities deposited as aforesaid; and the State treasurer, when tendered by such receiver a certified copy of the order authorizing such receiver to receive such securities, shall transfer and deliver such securities to such receiver; and such receiver shall administer the trust fund invested in such securities for the benefit of the policyholders of such company under the orders of the court to which such receiver is accountable. (Connecticut General Statutes, Revision of 1902; chap. 210, p. 904.)

Surely it will not be contended that the Congress exercising its war powers, can not extend a similar right of possession to the Alien Property Custodian.

detail, as they all involve simply this mere question of possession. The *Maxwell* case is subject to further distinction in that it was brought by the insurance company itself, and not by a receiver, or any other executive or judicial officer or official; and the *Babcock* case involved a contest between the general creditors and those protected by the trustee.

The case of *Farmers Loan & Trust Company* v. *Aberle*, 19 App. Div. 79, is in harmony with the decisions in these various cases as above interpreted.

However, if these cases be any authority against the right of the Alien Property Custodian to possession they will be discharged by this court. The Federal courts, even without the backing of express statutory authority, as the Trading with the Enemy Act gives in this case, have refused to follow this rule of the State courts, and have transferred possession of securities from a State official to the receiver appointed by the Federal courts for the insolvent corporation. *Morrill* v. *American Reserve Bond Co.* (Cir. Court W. D. Mo., 1907), 151 Fed. 305. Judge Sanborn, in the opinion in that case, after discussing the New York cases cited by plaintiffs in error, says:

> Is the jurisdiction of the Federal court, sitting in equity, to enforce this trust, and to liquidate the affairs of these insolvent corporations, thus limited by the statutes of the State of Missouri? Cestuis que trust, qualified citizens of another State, exhibited their

bill in this court to foreclose a pledge, and to enforce a trust for their benefit. Many other bondholders similarly situated have intervened and prayed the same relief. The answer of all the defendents have been filed, and they admit that the complainants are ultimately entitled to the relief they pray. The remaining question is one of method of administration; not of right to recover. A Federal court, sitting in equity, has the plenary jurisdiction of the English Court of Chancery, and one of the inherent powers of each court is to take and to hold by its own hands—by its receivers—the control and the possession of mortgaged, pledged, and trust property during the pendency of suits concerning it in those courts whenever, in the exercise of a wise judicial discretion, these courts are of the opinion that the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action. The statutes of the State of Missouri do not, by their terms, and the legislature of the State never intended that they should, in any way, limit or impair this power of the Federal courts. Moreover, the power of the Circuit Courts of the United States to adjudicate claims and administer remedies in equity is vested in them as a part of the judical power of the Nation by the Constitution of the United States, and the Judiciary Act of 1789, and, as it was not granted by it may not be revoked, impaired, or limited by the act of any State. Whenever citizens of different States lawfully invoke the juris-

> diction of the Federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts, and no State, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing, or of conducting litigation, by prohibiting the siezure of the subject of the litigation, during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject matter during its pendency, in accordance with their established rules of practice, and finally to adjudicate the claims of the parties, and to enforce their judgments (pp. 313–314).

If the Federal courts, by virtue of their inherent equitable jurisdiction, have authority thus to take from a State official securities deposited with him, pursuant to State statutes, certainly it can not be said that the rights of the Alien Property Custodian, an official of the United States, vested with express statutory authority so to do, are any less.

In two cases of *Robinson* v. *Mutual Reserve Life Insurance Company* (Circ. Court, S. D., N. Y. 1908), 162 Fed. 798–800, it was held, in opinions by Ward,

C. J., that the receiver of the insolvent company, appointed by the court, was authorized to take possession of funds deposited, both with the Central Trust Company of New York, as trustee, and with the superintendent of insurance of the State of New York. The New York cases here relied upon by the plaintiffs in error, were distinguished, upon the ground pointed out, that the deposits involved in those decisions were required by law, and were not permissively made, as in the instant case, and that there was in those cases an express power of distribution in the commissioner of insurance. The terms of the deed of trust with the Central Trust Company of New York, and the agreement with the superintendent of insurance of the State of New York, in the *Mutual Reserve* cases, were in all material respects like that in these cases. The agreement with the superintendent of insurance contained this clause:

> That party of the first part has this day deposited with party of the second part the sum of $100,000.00, in interest-bearing bonds of the United States of America, in trust, as security for the policyholders, or members of the party of the first part, for the sole use, benefit, and protection of said policyholders, or members, *and as such security for, and during the time the party of the first part shall continue in business, and until each and every liability to all its said policyholders, and members shall be adjusted and fully paid.*

It is unnecessary to determine whether the interpretation of these New York cases, made by Judge Sanborn, or Judge Ward, is the more accurate. In the present case the deposit was permissive, and not mandatory, and no power of distribution, without the assent of the insurance company, or a decree of court, was vested in the trustees. Whatever might be the power of the State courts under these decisions, the Federal court, without express statutory authority, would have vested in its receiver, duly appointed for the Munich Re-Insurance Co., possession of these securities libeled herein. This, of course, could only be on the theory that the securities remained the property of the insurance company, subject to distribution by the court of equity, according to such priorities as might exist.

The opposing brief (p. 102) attempts to discount the authority of the *Robinson* case by contending that, in that case, the trustee was simply an agent of the depositing company. The trustees here are, in essence, nothing more.

An effort has been made by the plaintiffs in error to distinguish the principle in the case of *Morrill* v. *American Reserve Banking Co.*, 151 Fed. 305, from the principle invoked in the case at bar. To this end they cited the case of *Risk* v. *Kansas Trust and Banking Co.*, 58 Fed. 45, decided by the same judge who decided the *Morrill* case. It is difficult to find a foundation in the *Morrill* case for the statement of the plaintiffs in error that the real grounds of the

decision were that the trust was one in name only and that by express statutory provision forming a part of the trust, authority was given to appoint a receiver who should liquidate. The most troublesome question before the court in the *Morrill* case was whether the Federal court could interfere in a trust created pursuant to State law and where a specific State procedure had been provided. Not only is it true that there was some language in the opinion tending toward the view that the court had power to disregard the authority of State decisions, but there is a specific holding to that effect, as shown by the excerpt given above.

It is true that in the *Morrill* case some of the creditors were parties to the suit and agreed to the proceedings, but there was a large number of creditors who were not parties.

The *Risk* case has no applicability either to the *Morrill* case or to the case at bar. It is neither in conflict with the decision of the *Morrill* case nor with the proposition contended for by the defendants in error. It stood for a very simple proposition, namely, that where a company had issued bonds which were secured by collateral, a receiver appointed at the instance of an unsecured judgment creditor could not hold these securities for the general creditors, since so to do would be a breach of the contract of the insolvent with the secured creditor. This proposition is elementary, but it has no applicability to the case at bar. In the *Risk* case the right of the secured creditor to have the securities applied to his

liquidated debt was absolute. In the case at bar the trust deed specifically provided that no claims of policyholders or creditors of the German company could be paid by the trustees except with the consent of the company or after a judgment had been secured upon the claim. Furthermore, here the trust deed provided that any one or all of the trustees could be removed by the settlor and others substituted in their place. In the *Risk* case to permit the receiver to hold the securities in question would have been a violation of the contractual right of the secured creditor. In the case at bar the Alien Property Custodian taking possession of the property will in no sense affect the rights of any policyholder or creditor. Section 9 of the act provides ample remedy for the recovery of all claims against the German company. Furthermore, the Alien Property Custodian, standing in the shoes of the enemy, is exercising the right of the enemy under the trust deed to remove the trustees and make himself the trustee, as he, having no beneficial interest in the property, would not share the company's obvious disqualification to act as fiduciary.

The *Morrill* case and the *Risk* case are in no sense inconsistent, and the *Risk* case has no applicability whatsoever to the case at bar.

4. *Construction by act of parties.*

In confirmation of this interpretation of the situation, attention is called to the action of all parties prior to the time the present controversy arose. Under the proclamation of the President issued on April 6, 1917 (Exhibit 2 to the answer, pp. 26–27), the

insurance commissioner of the State of Connecticut issued his proclamation, in which he prescribed rules and regulations applicable to funds "belonging to or held for the benefit of such insurance companies (i. e., enemy insurance companies)" (Exhibit 3 to the answer, pp. 27–29). Rule No. 7 provides that securities deposited with United States trustees (i. e., the present claimants in the case of the Munich Company) should be subject to the joint control of the commissioner and the trustees. The insurance commissioner of Connecticut obviously at that time considered that these securities now libeled then belonged to the Munich Company just as its other securities held by its United States managers. Apparently counsel for these claimants considered this action proper, as they rely upon it in their answer (paragraphs 21 and 22, pp. 17–18).

5. *The libeled securities were clearly within the purview of section 7 (c) and without that of 8 (a) and the custodian was expressly authorized to demand and take possession of same.*

Considered by itself, section 7 (c) might be capable of the construction placed upon it by plaintiffs in error, to the effect that it vested the Alien Property Custodian with no more rights or powers than the enemy; and that it applied only to property where a full and complete legal title as well as the right of immediate possession was vested in the enemy. Without discussing all of the different situations which might be conceived, however, it is sufficient for a decision of this case simply to hold that when

property belongs to, or is held for or on account of an enemy but subject to a pledge or other right in the nature of security, in favor of a person not an enemy, the Alien Property Custodian is authorized to take possession of the property; and the holder of such right must propound his claim and secure payment of the debt or liability out of the property involved, through the machinery of section 9.

The argument above made with respect to the rights and liabilities created by the Connecticut statutes and the terms of the deed of trust, if sound, clearly brings these libeled securities within the literal terms of section 7 (c), and demonstrates that they belonged to the Munich Company, and were held for, on account of, or for the benefit of that company. The *Keppelmann* case, as decided upon appeal, as has been pointed out, is in direct conflict with their contention. That case holds definitely that it applies to all property held for the benefit of the enemy irrespective of where the legal title might be; and that the custodian is not limited to the same remedies or procedure that the enemy would have had to follow.

The possession of property held under mortgage, pledge, lien, or other right in the nature of security is a *remedy* rather than a *right* of property. It is entirely distinct from possession coupled with the right to the beneficial use or enjoyment of the property. Neither these trustees nor the policyholders or creditors, however, were entitled to any such use or enjoyment of these libeled securities, the

insurance company having, as above pointed out, not only the right to receive the income but all the other beneficial rights, in connection therewith, except possession. It is clearly within the power of Congress to deprive the mortgagee, pledgee, or other holder of a right in the nature of security, of the possession of the property involved, and to place such possession in the Alien Property Custodian, provided there is given *another* reasonably effective remedy by which this right of security may be realized upon. *Bernheimer* v. *Converse*, 206 U. S. 516, 530, and case there cited.

That Congress intended section 7 (c) to have this effect is made certain by the provisions of section 8 (a). As originally drafted, this section read:

> That any person not an enemy or ally or enemy holding a mortgage, pledge, or lien on, or other right in the nature of security in property of an enemy or ally of enemy, may, after default, dispose of such property under such rules and regulations and after such notice as the Secretary of Commerce shall prescribe; and such notice shall have in all respects the same force and effect as if duly served upon the enemy or ally of enemy personally provided (etc., as now enacted).

Objection was made to this provision, upon the ground that it gave a right of foreclosure, or disposition where none might exist under the State law, and, in addition, substituted the rules and regulations of the Secretary of Commerce for the method of foreclosure, or disposition otherwise ap-

plicable (see Congressional Record, 65th Congress, July 11, 1917). The objection prevailed and the act was amended as it now reads. A sharp distinction is made, therefore, between mortgages, pledges, liens, or other rights in the nature of security, which carried a power of disposition on notice, presentation, or demand, and those which did not carry such power.

The distinction between liens, with a right of foreclosure or disposition, and those without is well known to the common law. As a matter of fact, the common law lien carried with it no power of disposition, and the innkeeper who sheltered and fed the traveler could hold his baggage until his entertainment was paid for, but he had no power of enforcing payment of his bill by sale, or other disposition of the baggage.

Congress recognized this distinction of the law, and provided that the holders of certain liens, with a right of foreclosure, might continue to hold the property until maturity of the debt, and then foreclose; but this express power of withholding property is given only in a limited class of cases. The limiting of this power to certain classes necessarily excludes it from others, and the statute, therefore, expressly authorizes the custodian to demand securities, even though the person in whose possession they may be has a lien upon the same, unless the lien comes within those described in this section.

Just what effect is to be given the words "notice, presentation, and demand" will, of course, depend upon the facts in each case. For example, "notice"

may be a notice from a broker for additional margin deposit; "presentation" may be presentation for payment of a note or draft; "demand" may be demand for payment of a note or other obligation. The argument that a mortgage, pledge, or lien, which may be foreclosed without any notice, presentation, or demand, is not included within the purview of this section is another instance of juggling with a few words instead of considering the section as a whole and its function in the general plan of the Act. Certainly in such a case notice or demand could be given, and therefore it would be a case of property which could be disposed of after "notice, presentation, or demand." The greater always includes the lesser. By the terms of the proviso in this section, in such a case no notice, presentation, or demand would be required, but at the same time the fact that such action is not required does not prevent it from being property which *may* be disposed of on *notice*, *presentation*, or *demand*.

The word "on" just before the words "notice, presentation, or demand" is possibly somewhat inapt, as obviously what is meant is "after." These words clearly prescribe, not the method by which the disposition is to be made but conditions precedent to such disposition.

Subsequently in this section the words "upon notice" and "on presentation or demand" are used in connection with contracts. There the words "upon" and "on" evidently mean "by." In the clause under consideration, however, the word "on"

can not possibly have this meaning, as property held under mortgage, pledge, or lien is not disposed of "by" (in the sense of "by means of") notice, presentation, or demand, but only "after" such action

It is unnecessary, however, for the purposes of this case, to determine exactly what classes of rights in the nature of security are included within its meaning. It certainly was inserted in the Act for some purpose and must be given some meaning. This meaning is not to be determined by hairsplitting distinctions or undue refinements in definition of the precise words employed. Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and, if possible, so as to avoid an unjust or an absurd conclusion. Chief Justice Fuller, in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59. Taking the section as a whole and applying common sense to its construction, there can be little doubt that it is applicable to a large number of cases whereby under agreement of the parties or by statute the creditor is authorized to foreclose upon the security. Ordinary real estate mortgages, which carry a power of sale upon default without resort to judicial proceedings, collateral deposited under the collateral note, commonly used by banks all over the country, and brokers' margin accounts, are typical illustrations of rights in the nature of security included within the meaning of this section. As is so well expressed by Judge Hand in his opinion in the court below, there is a sound reason for making a distinction between

rights such as this and other cases of security such as is presented by the facts in these cases. "*Expressio unius est exclusio alterius; United States* v. *Arrendondo*, 6 Pet., at 725; *Stevens* v. *Smith*, 10 Wall. 321; *Raleigh etc., R. R. Co.* v. *Reid*, 13 Wall. 269; *United States* v. *County of Macon*, 99 U. S. 582; *Dewhurst* v. *Feilden*, 7 M. & G. 182. If the custodian was not entitled to possession of pledged property not within this provision, what was the purpose or need of the provision?" (P. 83.)

If it had not been argued so insistently by plaintiffs in error that the terms of section 8 (a) were broad enough to include the situation created by the deposit with these claimant trustees, we would be tempted to say it is too plain for argument that this section is not applicable. As is pointed out above, whatever may be the exact nature and extent of the rights in favor of the policy holders and creditors of the Munich Re-insurance Company, this right in the nature of security is not one which either by law or by the terms of the instrument creating the same may be disposed of "on notice or presentation or demand." There is vested in neither the trustees nor the policyholders and creditors any right of disposition whatsoever except pursuant to a judgment of court or an order from the insurance company. There is in fact a direct conflict between this argument and the argument that the securities libeled do not belong to the Munich company or were not held for that company.

The Circuit Court of Appeals, while reaching its conclusion through a somewhat different chain of reasoning, fully concurred in Judge Hand's opinion that section 8 (a) was inapplicable and that that section was designed primarily to protect collateral loans (p. 96).

6. Section 9 affords adequate protection for whatever rights the policyholders and creditors may have in the securities libeled.

Some point is made in plaintiffs in error brief that the construction of the Act contended for by the custodian would result in depriving certain policyholders or creditors of their rights because their claims may not mature within six months after the termininination of the war and they may be barred from filing action under section 9 of the Act. The answer to this is that by an appropriate bill in equity which may be filed under section 9 immediately upon delivery of the securities to the custodian, these securities may be impressed with whatever rights these policyholders and creditors have, assuming that they would not come into the custodian's hands subject to these rights without such proceeding. Section 9 is not limited to persons having matured debts. The language "Any person claiming any interest, right, or title in any money or other property which may have been delivered to the custodian" is broad enough to cover this situation; and the custodian is expressly required to hold the property involved until termination of

the litigation, and by the last paragraph of section 12 is required forthwith to convey, transfer, assign, and pay to a person in whose behalf the court shall enter any final judgment or decree any property of an enemy held by the custodian, so far as may be necessary to comply with said judgment or decree. If the trustees are entitled on behalf of the policyholders and creditors to assert any right in this proceeding, they certainly could file such bill under section 9, and the court could by appropriate decree direct that these securities be kept segregated by the custodian and applied in satisfaction of claims of policyholders and creditors in the United States as they mature; and that all of such claims should be fully satisfied prior to the application of these securities to any other account. The creditors of the Munich company might, after the six months' period, be barred from maintaining any action of debt under section 9 to be paid out of any property of the Munich company held by the custodian or the treasurer; but this is no reason why the bill as outlined above could not be filed prior to the expiration of six months after the war so as to afford adequate protection to all such policyholders and creditors. It is elementary that the right of security may exist after an action at law for the collection of the indebtedness secured is barred.

As a practical matter this seems the only procedure by which these securities can be applied in satisfaction of such claims. The prohibitions

of section 3 of the Act prevent the Munich company or anyone on its behalf from giving assent to payment by the trustees, and it does appear how the claims can be reduced to judgment. Since the revocation of the Treasury license there is no one authorized to act in this country for the Munich company; and the argument on behalf of plaintiffs in error admits that whatever interest or rights the Munich company had in these securities have been vested in the custodian. Certainly no court could order distribution of these securities unless the custodian were a party to such proceeding; and in view of the provisions of section 9 and the last paragraph of 7 (c), as amended, any such action is clearly prohibited. Both the plain provisions of the law and the practical ends of justice require that the decree appealed from be affirmed.

Proposition III.

The decrees of the district court appealed from were correct and should be affirmed.

If the foregoing argument be somewhat longer than this court may, after consideration thereof, deem necessary, justification therefor is suggested because of the novelty of the questions presented and the importance of the decision, not only in view of the amounts involved in this case, but because of the many other issues that may be settled by the decision herein. Stripped of all obscurities, the issues presented are simple.

Is the Alien Property Custodian entitled to possession of the securities herein libeled merely upon the strength of his demand and his order for the seizure thereof, or must this court consider the merits of the defense asserted and determine whether, upon the facts presented in the answer, the securities libeled were enemy property; and if so, whether the rights asserted by these claimants were sufficient to prevent the custodian from taking possession thereof?

It is submitted that upon either alternative the decision must be in favor of the custodian. The Trading with the Enemy Act was intended to authorize, through Executive action, speedy capture of all enemy property within the United States; and the Alien Property Custodian was authorized to take possession of property by whomsoever it might be held whenever, after investigation, he had determined the property to belong to or to be held for or on account of or for the benefit of an enemy. To make the Act effective as a war measure, it was the clearly expressed intent of Congress that possession should be delivered to the custodian and litigation had upon nonenemy claims to the property seized after the property had come into the possession of the custodian.

However, if it be proper for this court, in this proceeding, to examine into the merits of the claim asserted, the result still must be that the custodian is entitled to possession. These securities remained the property of the Munich Re-In-

surance Company, both in the ordinary acceptance of that term and within the purview and meaning of section 7 (c) of the Trading with the Enemy Act; and the most that can be said for the non-enemy rights asserted is that these rights are in the nature of security not within the scope of section 8 (a). Congress, by the provisions of this Act, clearly intended that the custodian should take possession of property such as this, and that the holders of such rights should bring their bill in equity under section 9 of the Act, in the event that they were unable to secure executive allowance by application to the Attorney General, exercising the power and authority vested by section 9 in the President. Neither the powers granted to this court in these proceedings nor the pleadings filed are sufficient to authorize a determination in this proceeding of the exact nature and extent of the rights, if any, vested in the policyholders and creditors of the Munich company or in these claimants as trustees for them if in fact they are in any sense trustees for these policyholders and creditors. This proceeding is one of possession alone, and no other rights can be determined herein. Under certain circumstances the issue of possession may be determined by the question of title; and if these claimants had asserted and established by the allegations of their answer full and complete ownership of the securities libeled, instead of at most a mere right of security therein, there would be some basis for their contention that

the decrees appealed from should be reversed. The facts which they set up, however, are entirely insufficient to justify in these cases the construction which they contend should be placed upon section 17 of the Act.

The Alien Property Custodian is entitled to the possession of the libeled securities because he was authorized to demand possession thereof and to seize them, with or without such demand, and because the facts which these plaintiffs in error set forth in support of their claim confirm the custodian's determination and justify his demand. It is therefore respectfully submitted that the decrees appealed from were correct and should be affirmed.

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APPENDIX A.

Cited Sections of the Trading with the Enemy Act.

Sec. 2. That the word "enemy," as used herein shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals of any nationality resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The Government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy" as used herein shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals of any nationality resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The Government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person" as used herein shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States" as used herein shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the

United States or occupied by the military or naval forces thereof.

The words "the beginning of the war" as used herein shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war" as used herein shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks" as used herein shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade" as used herein shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 3. That it shall be unlawful—

(a) For any person in the United States, except with the license of the President, granted to such per-

son, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

(b) For any person, except with the license of the President, to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of any enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen.

(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other

form of communication intended for or to be delivered directly or indirectly, to an enemy or ally of enemy: *Provided, however*, That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions as shall be prescribed by the President.

(d) Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored, under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall be punished as provided in section sixteen of this Act.

SEC. 4. (a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States through an agency or branch office, or otherwise, may, within thirty days after the passage of this Act, apply to the President for a license to continue to do business; and, within thirty days

after such application, the President may enter an order either granting or refusing to grant such license. The license, if granted, may be temporary or otherwise, and for such period of time, and may contain such provisions and conditions regulating the business, agencies, managers, and trustees, and the control and disposition of the funds of the company, or of such enemy or ally of enemy, as the President shall deem necessary for the safety of the United States; and any license granted hereunder may be revoked or regranted or renewed in such manner and at such times as the President shall determine: *Provided, however*, That reasonable notice of his intent to refuse to grant a license or to revoke a license granted to any reinsurance company shall be given by him to all insurance companies incorporated within the United States and known to the President to be doing business with such reinsurance company: *Provided further*, That no insurance company, organized within the United States, shall be obligated to continue any existing contract, entered into prior to the beginning of the war, with any enemy or ally of enemy insurance or reinsurance company, but any such company may abrogate and cancel any such contract by serving thirty days' notice in writing upon the President of its election to abrogate such contract.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made by any enemy or ally of enemy insurance or reinsurance company, within such thirty days as above provided, the provisions of the President's proclamation of April sixth, nineteen hundred and seventeen, relative to agencies in the United States of

certain insurance companies, as modified by the provisions of the President's proclamation of July thirteenth, nineteen hundred and seventeen, relative to marine and war-risk insurance, shall remain in full force and effect so far as it applies to such German insurance companies and the conditions of said proclamation of April sixth, nineteen hundred and seventeen, as modified by said proclamation of July thirteenth, nineteen hundred and seventeen, shall also during said period of thirty days after the passage of this Act, and pending the order of the President as herein provided, apply to any enemy or ally of enemy insurance or reinsurance company, anything in this Act to the contrary notwithstanding. It shall be unlawful for any enemy or ally of enemy insurance or reinsurance company, to whom license is granted, to transmit out of the United States any funds belonging to or held for the benefit of such company or to use any such funds as the basis for the establishment directly or indirectly of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made within such thirty days by any enemy or ally of enemy, other than an insurance or reinsurance company as above provided, it shall be lawful for such enemy or ally of enemy to continue to do business in this country and for any person to trade with, to, from, for, on account of, on behalf of or for the benefit of such enemy or ally of enemy, anything in this Act to the contrary notwithstanding:

Provided, however, That the provisions of sections three and sixteen hereof shall apply to any act or attempted act of transmission or transfer of money or other property out of the United States and to the use or attempted use of such money or property as the basis for the establishment of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

If no license is applied for within thirty days after the passage of this Act, or if a license shall be refused to any enemy or ally of enemy, whether insurance or reinsurance company or other person, making application, or if any license granted shall be revoked by the President, the provisions of sections three and sixteen hereof shall forthwith apply to all trade or to any attempt to trade with, to, from, for, by, on account of, or on behalf of, or for the benefit of such company or other person: *Provided, however*, That after such refusal or revocation, anything in this Act to the contrary notwithstanding, it shall be lawful for a policyholder or for an insurance company, not an enemy or ally of enemy, holding insurance or having effected reinsurance in or with such enemy or ally of enemy insurance or reinsurance company, to receive payment of, and for such enemy or ally of enemy insurance or reinsurance company to pay any premium, return premium, claim, money, security, or other property due or which may become due on or in respect to such insurance or reinsurance in force at the date of such refusal or revocation of license; and nothing in this Act shall vitiate or nullify then existing policies or contracts of insurance or reinsurance, or the conditions thereof; and any such

policyholder or insurance company, not an enemy or ally of enemy, having any claim to or upon money or other property of the enemy or ally of enemy insurance or reinsurance company in the custody or control of the Alien Property Custodian, hereinafter provided for, or of the Treasurer of the United States, may make application for the payment thereof and may institute suit as provided in section nine hereof.

(b) That, during the present war no enemy, or ally of enemy, and no partnership of which he is a member or was a member at the beginning of the war, shall for any purpose assume or use any name other than that by which such enemy or partnership was ordinarily known at the beginning of the war, except under license from the President.

Whenever, during the present war, in the opinion of the President the public safety or public interest requires, the President may prohibit any or all foreign insurance companies from doing business in the United States, or the President may license such company or companies to do business upon such terms as he may deem proper.

SEC. 5. (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful

without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof, and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof, he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.

(b) That the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise, or between residents of one or more foreign countries, by any person within United States; and he may require any such person engaged in any such transaction to furnish under oath, complete information relative thereto, including the production of any books of account,

contracts, letters, or other papers in connection therewith in the custody or control of such person, either before or after such transaction is completed.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The Alien Property Custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided*, That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided further*, That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of

property taken into custody and the disposition made thereof.

SEC. 7. (a) That every corporation incorporated within the United States, and every unincorporated association, or company, or trustee, or trustees within the United States, issuing shares or certificates representing beneficial interests, shall, under such rules and regulations as the President may prescribe and, within sixty days after the passage of this Act, and at such other times thereafter as the President may require, transmit to the Alien Property Custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

The President may also require a similar list to be transmitted of all stock or shares owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy, or in which any such person had any interest; and he may also require a list to be transmitted of all cases in which said corporation, association, company, or trustee has reasonable cause to believe that the stock or shares on February third, nineteen hundred and seventeen, were owned or are owned by such enemy or ally of enemy, though standing on the books in

the name of another: *Provided, however*, That the name of any such officer, director, or stockholder shall be stricken permanently or temporarily from such list by the alien property custodian when he shall be satisfied that he is not such enemy or ally of enemy.

Any person in the United States who holds or has or shall hold or have custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States, who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath, containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy, or ally of enemy, on February third, nineteen hundred and seventeen: *Provided*, That the name of any person shall be stricken from the said report by the Alien Property Custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or

reports required by this section for an additional period not exceeding ninety days.

* * * * *

(c) If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

Amended. (See p. 119 hereof.)

SEC. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made

upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

SEC. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance,

transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or

decree shall be entered against the claimant, or suit otherwise terminated.

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

This section shall not apply, however, to money paid to the Alien Property Custodian under section ten hereof.

Amended. (See p. 121 hereof.)

SEC. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business

in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately be-

come entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of an enemy, or of an ally of enemy, to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or

decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further*, That the Treasurer of the United States o,n order of the Alien Property Custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

Amended. (See p. 124 hereof.)

SEC. 16. That whoever shall willfully violate any of the provisions of this Act, or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An

Act to codify, revise, and amend the laws relating to the judiciary."

AMENDMENTS TO SECTIONS.

(1) ALIEN PROPERTY CUSTODIAN: Subsection (c) of section seven of the "Trading with the Enemy Act," approved October 6, 1917, is amended to read as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded

shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interests to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

(40 Stat. at Lg., ch. 201, p. 1020.)

AMENDMENT TO SECTION 9 OF THE TRADING WITH THE ENEMY ACT.

[Extract from "An Act Making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, and for other purposes," approved July 11, 1919.]

That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at

any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claim,ed shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated: *Provided, however*, That in respect of all property heretofore determined by the President to have been held for, by, on account of, or on behalf of, or for the benefit of a person who was an enemy or ally of enemy, if the President, after further investigation, shall determine that such person was an enemy or ally of enemy solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary, or their allies, and that such person is a citizen or subject of such asso-

ciated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said enemy or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian. And the receipt of the said enemy or of the person by whom said property was conveyed, transferred, assigned, or delivered to the Alien Property Custodian, shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however*, That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof.

(41 Stat. at Lg., ch. 5, p. 935.)

Sec. 9 was again amended on June 5, 1920, but since none of the provisions of that amendment are relevant to the questions here involved, the amendment has not been inserted.

The fourth paragraph of section twelve of the "Trading with the Enemy Act," approved October sixth, nineteen hundred and seventeen, is amended to read as follows:

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided*, That any property sold under this act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at

public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

(40 Stat. at Lg., 459, ch. 28.)

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APPENDIX B.

EXECUTIVE ORDER.

[An Executive order prescribing additional rules and regulations, and making certain determinations respecting the exercise of the powers and authority and the performance of the duties of the Alien Property Custodian.]

By virtue of the authority vested in me by "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, known as the "Trading with the Enemy Act," as amended, I hereby make the following orders, rules and regulations, and determinations.

DEFINITIONS.

1. The words "insurance company" as used herein shall be deemed to mean a partnership, association, mutual company, branch, general agency, whether incorporated or unincorporated, group of individual underwriters, corporation or body politic whose business in whole or in part consists of insurance or underwriting in any one or more of its branches.

2. The word "enemy" as used herein shall be deemed to mean either an "enemy" or "ally of enemy," as the case may be.

Powers of management and administration, Including sale or other disposition.

The Alien Property Custodian shall have power, and he is authorized and directed, to hold, manage, administer, protect, preserve, control, and to reinsure or retrocede, and to sell or otherwise dispose of, in accordance with the following rules and

regulations, any and all property, other than money, of any insurance company heretofore doing business within the United States which has been or shall be conveyed, transferred, assigned, delivered, and/or paid over to him, pursuant to the provisions of the "Trading with the Enemy Act" as amended, and the proclamations and Executive orders in pursuance thereof, of which has been or shall be required so to be conveyed, transferred, assigned, delivered, and/or paid over to him, or which shall be seized by him.

1. The Alien Property Custodian shall have the power and authority to do any and all things reasonable and proper in or about the taking over, custody, management, administration, protection, preservation, and control of such business, property, and assets, including (but without limiting the generality of the foregoing) the power and authority to collect all premiums, commissions, agency balances, bills, notes, accounts, dividends, interest, rents, and other receivables, and income and profits and accumulations and distribution of principal or income; to pay all leases, claims, premiums, adjustment charges, rents, interest, and other accounts and liens or charges; to vote in person or by proxy shares of stock or other beneficial interest in corporations, unincorporated associations, companies, or trusts upon any questions at all times and upon all matters upon which any owner of such stock or other beneficial interest shall have the right to vote, including the power and authority to vote for or against and to take part in any sale, dissolution, consolidation, amalgamation, or reorganization of any such corporation, unincorporated association, company or trust, or of its assets or any

part thereof, and to exercise any rights or privileges that may be or become appurtenant to the ownership of such stock or other beneficial interest, with like force and effect and under like circumstances in all respects as though the absolute owner thereof; to give any notices and file any papers or writings of any kind, proper or necessary for the creation, perfection, protection, liquidation or otherwise in respect of any claims, demands, choses in action or other rights of any kind, and to settle, compromise, and adjust claims, demands, and choses in action; to intervene in any suit or proceeding and to file and maintain claims, demands, and suits of all kinds in or before any court, board, commission or other body; to determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depositary for him, including expenses that may be incurred in or about securing possession, custody, or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property, by any body politic: *Provided*, That this shall not be construed to require the payment of any stamp or other taxes upon or on account of conveyance, transfer, assignment, or delivery of property to the Alien Property Custodian or to any agent, attorney, bailee, nominee, or depositary for him: *And provided further*, That this shall not in any way affect the power of the Commissioner of Internal Revenue or any regulations made by him or under his authority.

2. Whenever any such property or any part or parcel thereof is or shall be subject to any claim

of lien, charge, or incumbrance, or is or shall be held or retained adversely to the Alien Property Custodian or to any requirement with respect to such property made by him, the Alien Property Custodian may compromise or settle controversy and pay any such claim in any way that he shall decide to be proper and as though he were absolute owner of the property involved; and he shall have the power and authority to make any payment or payments necessary and to execute and deliver any instruments or writings necessary and proper to effect or evidence the same.

3. Whenever any such property or any part or parcel thereof shall constitute part of, or have been used in the conduct of, the business of any such insurance company, the Alien Property Custodian, in addition to the rights, powers, and authority elsewhere herein conferred upon him in respect of such property, may continue the conduct or other operation of the business of such insurance company conducted anywhere within the United States prior thereto by, or for, such company; and for such purpose, the Alien Property Custodian shall have the right, power, and authority to employ and discharge managers, agents, attorneys, servants, and other employees, to effect insurance and reinsurance, to issue policies, certificates, or other contracts of insurance or reinsurance; to adjust, compromise, settle and pay claims of every kind arising in connection with such business; to require money owing by insurance companies, banks, trustees, trust companies, State or municipal officers, or other depositaries on special or general deposit to be paid by him or upon his order; to collect debts, premiums, commissions, dues, assessments, and other receivables

owing to the said business or to the former enemy owner or owners thereof and created out of or by the operation of such business, and also debts, accounts, and other receivables accruing or arising out of the conduct or other operation or such business or undertaking, by the Alien Property Custodian or under his direction or authority to pay the wages and salaries of managers, agents, attorneys, servants, and other employees, and rents, and current accounts and other liabilities; to intervene in any suit or action pending in any court or before any board, commission, or other body in which such business or any of the property or assets thereof shall be involved or concerned and to prosecute or defend, as the case may be; to file, prosecute, and maintain in the name of the Alien Property Custodian or otherwise as may be proper, any claim or suit arising out of or based upon transactions had prior or subsequent to the time when such business or property was demanded or taken over by the Alien Property Custodian, but growing out of the conduct or operation of such business or any other use, custody, or management of any property or assets thereof; and generally, to manage, administer, preserve, conduct, operate, and control such business and any or all parts or parcels and assets thereof as though the absolute owner, either in the name of the Alien Property Custodian or otherwise, as he shall determine.

4. The Alien Property Custodian may appoint agents, attorneys, bailees, depositaries, liquidators, and/or managers, who, under his direction and control, within the limits of the authority conferred by him, shall be authorized and directed to hold, manage, administer, protect, preserve, and otherwise

control the business, property, and assets demanded and taken over by him, or any part or parcel thereof; and they may be authorized and directed to continue the conduct of such business which the Alien Property Custodian himself, as provided elsewhere herein, could continue. Such agents, attorneys, bailees, depositaries, liquidators, and managers shall have and exercise the rights, powers, and authority which shall be from time to time conferred upon him or them by the Alien Property Custodian; and such rights, powers, and authority may be enlarged, restricted, or revoked by the Alien Property Custodian at any time and without giving any notice or reason therefor; and the remuneration of all such agents, attorneys, bailees, depositaries, liquidators, and managers shall be fixed by the Alien Property Custodian and may be increased or reduced at any time.

5. The Alien Property Custodian shall have full power and discretion with respect to the business, property, and assets of any insurance company which has been or shall be conveyed, transferred, assigned, delivered, or paid over to him, or required so to be, or which has been or shall be seized by him, and may liquidate, reinsure, or retrocede, or sell or otherwise dispose of in accordance with the provisions of said "Trading with the Enemy Act," as amended, the said business in whole or in part at such times and upon such terms as he may determine, and may devote so much of the property and assets of such insurance company in his possession or under his control or subject to his demand as shall be necessary to effect such reinsurance or retrocession. Where the business is reinsured in whole or in part, such reinsurance shall be effected only in insurance

companies incorporated within and under the authority of the laws of the United States, or of any State or Territory of the United States.

6. The Alien Property Custodian shall have the power, in and about the conduct of such business and of its liquidation, retrocession, and/or reinsurance to sell at private sale, without public or other advertisement, any stocks, beneficial interests in stocks, including voting trust certificates and all other rights appurtenant to the ownership of stocks, bonds, negotiable instruments or evidences of indebtedness, and maps, in parcels, lots, or quantities having a market value at the time of the sale not exceeding ten thousand dollars ($10,000) for each parcel, lot, or quantity sold. Any such sale may be conducted at such place and upon terms and conditions as to the Alien Property Custodian or his authorized agent may seem proper. The reasons in the public interest for the foregoing determination, order, rule, and regulations are:

(a) The properties above described can not usually be sold to the best advantage at public sale after public or other advertisement.

(b) The sales hereby authorized may be made at the time and place of most favorable demand, and upon such terms and conditions as may be necessary to secure the best market price.

(c) Unnecessary expense, delay, and inconvenience may be avoided.

Effect upon the statutory powers of the Alien Property Custodian and upon prior Executive orders.

1. Nothing herein contained shall limit or shall be construed to limit, in any way, the rights, powers, and authority conferred upon the Alien Property

Custodian by the "Trading with the Enemy Act" and the amendments thereto and the Executive orders heretofore issued pursuant thereto.

2. All Executive orders heretofore made are amended and modified hereby to such an extent as may be necessary to conform with the provisions hereof; but, with this exception, all of such orders in force and effect at the time this order is issued are expressly ratified and continued in full force and effect.

WOODROW WILSON.

THE WHITE HOUSE,
12 November, 1918.

(No. 2991.)

APPENDIX C.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Francis P. Garvan, as Alien Property Custodian, libellant appellee, against $25,000 Par Value Canada Southern Railway Company 5% Bonds, etc., Albert H. Wiggin et al., claimants appellants.

Before WARD, HOUGH, and MANTON, Circuit Judges.

Francis G. Caffey, United States Attorney, for libellant appellee.

Rushmore, Bisbee & Stern, for claimants appellants.

WARD, *Circuit Judge*: July 9, 1919 the Alien Property Custodian filed this libel against $25,000 par value of Canada Southern Railway Company bonds and other securities then in the United States Safe Deposit Company of this city, praying the court to enter an order directing the United States marshal to seize and hold the same and citing all persons having any claim to posession thereof to appear and show cause why the marshal should not deliver them to the libellant, the Alien Property Custodian.

The usual monition issued on the same day, the marshal seized the securities July 15 and before the return day of the monition Albert H. Wiggin, Charles H. Sabin, and Walter T. Rosen appeared and claimed the securities as trustees and owners. Subsequently they filed a verified answer denying the allegations of the libel and setting up several separate independent defenses.

Judge Knox granted the Government's motion for judgment on the pleadings in favor of the libellant.

The first objection is that the securities were not seizable July 15 under the regulations of the War Trade Board dated July 14, amended July 20, 1919. These do not cover property which before July 14, 1919, had been reported to the Alien Property Custodian or which he had required to be delivered to him. These securities fall within the exception.

The next objection is that the libellant can not help out the allegations of the libel which are denied in the answer by any admissions contained in the separate defenses.

Although the Trading with the Enemy Act provides no specific form of action for enforcing its provisions, section 17 does give the United States District Courts power to make and enter "all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act." The Government proceeded by libel *in rem* in accordance with the long-established practice in cases of seizure of property on land under the Revenue Acts. Such proceedings are actions at law in which all issues of fact are triable by a jury, the judgment being reviewable by writ of error. All the same, for the determination of questions of law upon the pleadings we think the libellant is as entitled to avail of any and all admissions in the answer as he would be in admiralty. Our practice in actions at law is by section 914, U. S. Rev. Stat., only required to conform to the State practice "as near as may be."

Treating this answer and an affidavit of the attorney for the Alien Property Custodian, which by

stipulation is a part of it, as we would in admiralty, we think the judgment directing the marshal to deliver the securities in question to the Alien Property Custodian without prejudice to the claimants or any of them or any other person or persons with respect to any claim or claims they may see fit to file with the Alien Property Custodian pursuant to section 9 of the Trading with the Enemy Act or any suit or suits, action or actions, proceeding or proceedings they or any of them may see fit to institute thereunder or otherwise was right. See our decisions in *Garvan* v. *Bonds*, 265 Fed. Rep. 477.

The judgment is affirmed.